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No.

In the Supreme Court of the United States

IOWA NETWORK SERVICES, INC.,
Petitioner,

v.

QWEST CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 5, 2007

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QUESTION PRESENTED

Whether the Eighth Circuit improperly refused to apply the federal tariff deemed lawful by Congress and the FCC on the basis of a state agency's decision to disregard it, in violation of the uniform holdings of this Court from *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) to *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), and *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998) which hold that a federally regulated carrier's tariff exclusively governs the legal relationship between customer and carrier, particularly when the federal tariff was filed with the FCC for the specific purpose of resolving the instant dispute.

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings below.

Pursuant to Supreme Court Rule 29.6, Iowa Network Services, Inc. declares that it has no parent. Iowa Network Services, Inc. has an equity interest in Iowa Telecommunications Services, Inc., which is a publicly traded company.

Iowa Network Services, Inc. owns an interest in the following non-publicly traded companies:

INS Wireless, Inc.
Iowa Network Properties, Inc.
netINS, Inc.
Pine Island Capital Corporation

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Iowa Network Services, Inc. ("INS") hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 466 F.3d 1091, and is reproduced at Appendix to Petition for Certiorari ("App") 2a-13a. The order of the court of appeals denying INS' petition for rehearing (App. 1a) is unofficially reported at 2006 U.S. App. LEXIS 29811. The order of the United States District Court for the Southern District of Iowa. App. 14a-147a. granting summary judgment and dismissing INS' federal tariff enforcement action is reported at 385 F. Supp. 2d 850.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eighth Circuit sought to be reviewed was entered on October 31, 2006. The order of the U.S. Court of Appeals for the Eighth Circuit denying INS' petition for rehearing was entered on December 5, 2006. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional and statutory provisions involved in this case are U.S. Const. art. VI, cl. 2 and 47 U.S.C. §§ 153, 202, 203, 204, 251, 332, and 501, which are reproduced at

App. 169a-175a. The federal regulation, 47 C.F.R. § 51.223(a), is also involved in this case and is reproduced at App. 175a-176a.

STATEMENT OF THE CASE

The rural areas of Iowa are served by approximately 147 independently-owned small local phone companies (referred to in INS' tariffs as "Routing Exchange Carriers"). INS has deployed a fully redundant pair of access tandem switches and 1900 miles of fiber optic cable throughout Iowa to connect the networks of these small, rural phone companies to the networks of other carriers, such Qwest Corporation ("Qwest") and AT&T. INS' service, which is known as centralized equal access, has accelerated the provision of competitive telecommunications services to rural subscribers by aggregating rural phone calls at a single location in Des Moines. Through the concentration of rural phone calls, INS' service creates the same economies of scale for rural Iowa that previously were only available for the provision of telecommunications services to a densely-populated city.

Qwest, like many other carriers, placed written orders for INS' centralized equal access service in order to complete calls to the areas served by the rural phone companies. Qwest's network collected both wireline and wireless calls, including intrastate and interstate calls, and commingled those phone calls together before sending them to INS. Qwest alleged that some of the calls were originated by third party carriers rather than by Qwest, and that some of those third party carriers were cell phone carriers. As a result of the commingling of calls by Qwest, INS was not able to readily ascertain the identity of each carrier originating each call, or to block only those calls for which Qwest refused to compensate INS.

This dispute arose when Qwest refused to pay INS compensation pursuant to 47 U.S.C. § 251(b)(5) for local calls from cell phone carriers that Qwest forwarded over a period of several years to INS for completion, when INS lacked information regarding the identity of the cell phone carriers or other information needed to bill the cell phone carriers. To resolve this dispute, INS filed tariff provisions with the Federal Communications Commission ("FCC") stating that intermediary carriers, such as Qwest, will compensate INS for completing local cell phone calls if Qwest fails to provide the information requested by INS to accurately bill the cell phone carriers. See INS Tariff F.C.C. No. 1, §§ 16.2 and 16.5; App. 178a-179a. The tariff further provides that it is filed pursuant the FCC's primary jurisdiction under 47 U.S.C. § 332 over compensation for the transport of cell phone calls and for the purpose of establishing compensation for the completion of local cell phone calls under 47 U.S.C. § 251(b)(5). See INS Tariff F.C.C. No. 1, § 16.1; App. 177a.

The INS federal tariff was filed with the FCC pursuant to the "deemed lawful" tariff filing procedures in 47 U.S.C. § 204(a)(3), which were added by Congress when it enacted the Telecommunications Act of 1996 to give the FCC authority over local calling matters that previously had been within the sole jurisdiction of the state public utility commissions. The FCC published notice of INS' tariff filing seeking comments from the public and conducted its pre-effective tariff review. The FCC accepted INS' tariff filing and it was "deemed lawful" on November 11, 2000. That federal tariff is still effective and its filed status with the FCC remains in good standing.

While Qwest forwarded interstate and intrastate calls from cell phone carriers to INS for completion, Qwest did not

provide INS with information it requested to accurately bill the cell phone carriers for transporting those calls. Qwest was, therefore, responsible for compensating INS for completing those interstate and intrastate calls under the plain terms of the FCC tariff. Qwest's actions forced INS to provide Qwest with preferential service and to discriminate against competing carriers, as Qwest is the only intermediary carrier that has failed to comply with INS' federal tariff. When Qwest refused to pay INS' invoices for completing those interstate and intrastate calls, INS sued Qwest for violating the FCC tariff. The district court had federal question subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, as the obligation to make payments for telephone service at the rate fixed by a federal tariff arises from federal law embodied in the Communications Act ("Act"). The district court also had diversity subject matter jurisdiction over this tariff enforcement proceeding pursuant to 28 U.S.C. § 1332.

The district court did not enforce INS' federal "deemed lawful" tariff, and dismissed INS' claims. In granting summary judgment for Qwest, the district court ruled that the federal tariff could not "override' a decision by the Iowa Utilities Board ("IUB") App. 184a at n. 4, directing INS to disregard the federal tariff which was issued after the federal tariff was "deemed lawful." App. 110a. The district court held that "the Court is not examining the terms and provisions of the tariff" and "further finds it need not extensively analyze the parties' additional arguments concerning tariffs...These arguments include FCC jurisdiction and regulation versus state commission jurisdiction, conflict preemption, the 'filed tariff' doctrine, 'deemed lawful' status, and the validity and enforceability of the tariff language. Simply put, the Court has not engaged in any analysis of the terms of the tariff." App. 111a. INS asserted at each

pertinent stage of the district court proceedings that a state agency ruling requiring INS to disregard its federal tariff forces INS to violate the filed tariff doctrine of Sections 203(c) and 204(a)(3) of the Act and is therefore preempted by federal law.

On appeal, an Eighth Circuit panel held "In the absence of a clear mandate from the FCC or Congress stating how charges for this type of traffic should be determined, or what type of arrangement between carriers should exist, the Act has left it to the state commissions to make the decision". App. 10a. The panel further ruled that "neither the district court nor the IUB followed the filed rate doctrine". App. 9a. This holding is contrary to a century of uniform decisions of this Court (and courts of appeal), and this Court has previously summarily reversed courts of appeal decisions failing to follow this Court's filed rate doctrine precedents. *See, e.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983). This Court should follow the same course here.

On December 5, 2006, the court of appeals denied INS' petition for rehearing and suggestion for rehearing on banc. App. 1a.

REASONS FOR GRANTING THE PETITION

This Court previously has reversed a decision of the Eighth Circuit failing to apply the filed rate doctrine according to its statutory terms and this Court's precedents. *Maislin Industries, U.S., Inc., v. Primary Steel, Inc.*, 497 U.S. 116 (1990). In that case, this Court held that a federal agency's policy permitting deviation from the filed tariff rates violated the statutory filed rate doctrine. *Id.* at 131-135. Here, the Eighth Circuit has sanctioned deviation from the

federal tariff on the basis of a state agency policy, which also undermines the strict requirements of the filed rate doctrine arising from a federal statute. That decision was especially improper given the supremacy of federal law under Article VI of the U.S. Constitution over such a state agency policy. This Court should therefore follow the same course in this case as it did in *Maislin Industries* and reverse the Eighth Circuit.

In the decision below, the court of appeals ignored a century of this Court's decisions. The filed tariff doctrine is central to the rate regulation of common carrier industries. It is derived from federal statutory provisions prohibiting common carriers from providing services at any rate other than the filed (also known as the tariff) rate. *See* 47 U.S.C. § 203(c). Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the common carrier. *See* 47 U.S.C. §§ 203(e), 501. However, contrary to the well-settled precedents of this Court, and uniform decisions of other courts of appeals, the Eight Circuit held that the federal tariff, filed with the FCC for the specific purpose of resolving the instant dispute, does not exclusively define the rights, liabilities, and duties of the common carrier in providing regulated telecommunications services. In particular, the court of appeals held that (1) the federal courts do not have to follow the filed rate doctrine of Sections 203(c) and 204(a)(3) of the Act and (2) a state agency has the authority to require a common carrier to disregard its federal tariff filed with the FCC and instead negotiate contracts that conflict with the terms of the FCC tariff.

That decision is foreclosed by the decisions of this Court and in conflict with the decisions of every other circuit to address the effect of the filed rate doctrine on the enforcement of federal common carrier tariffs. The decision below will have profound and adverse consequences not only for

enforcement of the Communications Act and regulation of the telecommunications industry, but "across the spectrum of regulated utilities" that are governed by federal tariffs and the filed rate doctrine. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). Filed tariffs are "the heart of the common-carrier section of the Communications Act". *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998), *quoting MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994). Congress enacted the filed rate doctrine in several federal statutes to ensure the nondiscriminatory provision of common carrier services in numerous industries, including telecommunications, [1] electric power,[2] motor carriage,[3] natural gas,[4] and railroad transportation.[5] For these reasons, this Court has repeatedly acted to enforce the doctrine where regulatory agencies or lower courts have failed to do so---at least three times in the last thirteen years alone. *See, e.g. Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. at 49-50; *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. at 223; *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. at 234.

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[1] *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. at 222.

[2] *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 49-50 (2003).

[3] *Maislin Industries, U.S., Inc., v. Primary Steel, Inc.*, 497 U.S. at 127-131.

[4] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. at 582.

[5] *Burlington Northern Inc. v. United States*, 459 U.S. 131, 139-140 (1982).

Petitioner INS is a "common carrier" within the meaning of the Communications Act of 1934 ("the Act"). 47 U.S.C. § 153(h). It therefore must file with the Federal Communications Commission "schedules" (known as tariffs) of its "charges" and "the classifications, practices, and regulations affecting such charges" for its transport of cell phone calls. 47 U.S.C. § 203(c). It further must provide service under rates, regulations, and practices that are just and reasonable (47 U.S.C. § 201(b)), and is prohibited from engaging in discrimination among customers that is unjust or unreasonable. 47 U.S.C. § 202(a). These provisions of the Communications Act, like several other federal regulatory statutes, were copied from the filed tariff provisions of the 1887 Interstate Commerce Act.[6]

These statutory requirements embody what is known as the "filed rate doctrine" or the "filed tariff doctrine". The filed rate doctrine prevents unjust discrimination by ensuring that all similarly situated customers pay the same tariffed

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[6] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2, 4 (1934) and H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4, 5 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective.") The filed tariff decisions under the Interstate Commerce Act are, therefore, routinely applied by this Court to the parallel provisions of the Communications Act. *See, e.g., American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. at 222; *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. at 229-231.

rates, receive the same tariffed service, and have the same federal remedies if the service violates the tariff. *See Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. at 126-31. Contrary to the Eighth Circuit's decision, a "century" of this Court's decisions hold, that a federally regulated carrier's filed tariff exclusively "governs the legal relationship between [customer] and carrier," and that "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Maislin*, 497 U.S. at 126, 130; *American Telephone and Telegraph Co. v. Central Office Telephone*, Inc., 524 U.S. at 222.

Historically, the filed tariff rate was the "legal" rate, unless a customer established that the rate was unreasonable. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 384 (1932) (holding that "the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable"). In enacting the Telecommunications Act of 1996, Congress granted the Federal Communications Commission authority to regulate local calls and made the filed rate doctrine applicable to the telecommunications industry far stricter by adding 47 U.S.C. § 204(a)(3). In section 204(a)(3), Congress declared certain federal tariffs, like INS' tariff, to be "lawful".

Contrary to the Eighth Circuit's decision, App. 10a, INS' deemed lawful tariff does address the transport of intrastate or local cell phone calls. The tariff states: "This section establishes terms and conditions governing the intrastate and interstate use of Iowa Network's facilities in the transport of calls from a subscriber of a Commercial Mobile Radio Service (CMRS) provider to a subscriber of a Routing Exchange Carrier." App. 177a. A CMRS provider is defined as a provider of cell phone calls and a Routing Exchange Carrier is a local telephone company. App. 178a.

The FCC tariff also contains the rates that INS charges for transporting local cell phone calls. "The charge applicable to intrastate and interstate Commercial Mobile Radio Service Transport, is the same charge applicable to other uses of Iowa Network's CEA facilities, and is found in Section 6.8.1(A)." App. 180a.

The Eighth Circuit's decision was also improper because it held that INS' federal tariff was not a reciprocal compensation "arrangement" under 47 U.S.C. § 251(b). App. 10a. Congress used the term "arrangement" in Section 251(b), not "agreement", and a tariff is an "arrangement." Furthermore, the tariff explicitly states that it is a Section 251(b) reciprocal compensation tariff. "In the event that CMRS Transport is not considered an access service, compliance with this tariff satisfies a CMRS provider's obligation under 47 U.S.C. § 251(b)(5) to pay Iowa Network for the transport of CMRS calls." App. 177a.

The Eighth Circuit contravened the filed rate doctrine in requiring INS to negotiate an agreement that would conflict with the Section 251(b)(5) reciprocal compensation regulations in its "deemed lawful" FCC tariff. The filed rate doctrine remains a vital part of the law, and it is only the judgment below that threatens to eviscerate it. The compulsory arbitration of "agreements" described in 47 U.S.C. §§ 251(c)(1) and 252(b) does not apply to the services a common carrier provides to its customers, but instead only applies to incumbent local exchange carriers and their relationships with other carriers competing in the provision of local telephone service. There are thousands of common carriers that, like INS, are not incumbent local exchange carriers and do not provide local telephone service, and are still required to file tariffs with the Federal Communications Commission, in lieu of agreements, for the services they

provide to their customers. Furthermore, 47 U.S.C. § 251(f)(a)(A) expressly excludes thousands of rural telephone companies, like INS, from the Section 251(c) regulatory process involving the negotiation and arbitration of agreements. At the same time that Congress provided for "agreements" under Section 251(c)(1), it added 47 U.S.C. § 204(a)(3) to cause certain FCC tariffs to be "deemed lawful".

The FCC tariff language also holds an "intermediary carrier", such as Qwest, liable for compensating INS, should Qwest fail to provide INS with the information it needs to accurately bill the cell phone providers. The FCC deemed lawful tariff states in pertinent part:

> "If the Intermediary Carrier does not provide information requested by Iowa Network to accurately bill the CMRS provider, the Intermediary Carrier shall be the customer for purposes of this intrastate and interstate traffic. Iowa Network shall assess tariff charges to the Intermediary Carrier as described in this Section 16, and the Intermediary Carrier shall promptly pay such charges to Iowa Network pursuant to the terms of this tariff."

App. 179a.

Not surprisingly, given the clear meaning of "lawful" in 47 U.S.C. § 204(a)(3), the Eighth Circuit's decision conflicts with that of the D.C. Circuit. The D.C. Circuit held that, based on "unanimous" judicial determinations, Congress intended for a federal tariff that the FCC permits to become effective under 47 U.S.C. § 204(a)(3) to be treated by the courts as "conclusively lawful". *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411-412 (DC Cir. 2002). The Eighth

Circuit's refusal to give effect to the words in INS' "deemed lawful" FCC tariff was, therefore, tantamount to ignoring controlling federal law, and legislating new law. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. at 385-386.

The state agency decision by the IUB, upon which the Eighth Circuit based its decision, is preempted by federal law. App. 184a at n. 4. The Eighth Circuit disregarded a federal tariff "deemed lawful" by Congress "based upon the IUB's determinations." App. 13a. The Eighth Circuit's decision contravenes a "century" of rulings by this Court requiring the "strict" application of such a federal tariff and holding that "deviation from it is not permitted upon any pretext." *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. at 222. The IUB decision, upon which the Eighth Circuit based its decision, conflicts with and undermines the supremacy of federal law under the Constitution. Furthermore, the Federal Communications Commission has promulgated regulations that expressly preempt state agency decisions like that of the IUB. *See* 47 C.F.R. § 51.223(a); App. 175a-176a.

Resolution of the conflict described above is a matter of great national importance. The Eighth Circuit embraced a sweeping exception to well-settled principles underlying the filed rate doctrine that would subvert the orderly scheme that Congress has created and impede fulfillment of Congress' stated purpose. Under this exception, state agencies could interpose local parochial interests to preclude the federal courts from enforcing a federal tariff approved by the Federal Communications Commission and "deemed lawful" by Congress. The Eighth Circuit has made Qwest the beneficiary of the very discrimination that Sections 202 and 203 of the Act and the filed rate doctrine were intended to

prohibit. Unless the Eighth Circuit's decision is reviewed and reversed, the range of circumstances in which a state agency can assert parochial interests to disrupt the federal scheme for regulation of the telecommunications industry is virtually unlimited.

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should summarily reverse the decision of the court of appeals, or in the alternative, set the case for briefing and argument.

Respectfully submitted,

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March 5, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-3551

[Filed December 5, 2006]

Iowa Network Services, Inc., Appellant,	)
vs.	)
Qwest Corporation, Appellee.	)

OPINION

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Colloton did not participate in the consideration or decision of this matter.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-3551

[Filed October 31, 2006]

Iowa Network Services, Inc., Appellant,	)
v.	)
Qwest Corporation, Appellee.	)

Before BYE, HANSEN, and SMITH, Circuit Judges.

OPINION

SMITH, Circuit Judge.

Iowa Network Services, Inc. ("INS") brought this collection action against Qwest Corporation ("Qwest"), alleging violations of its federal and state tariffs, as well as unjust enrichment, for services provided in connecting wireless calls to rural Iowa telephone companies. The district court granted Qwest's motion to dismiss. INS appealed, and we reversed the district court's judgment and remanded for further proceedings. *Iowa Network Serv., Inc. v. Qwest*

Corp., 363 F.3d 683 (8th Cir. 2004) ("*Qwest I*"). On remand, Qwest filed a motion for summary judgment. As outlined in its thorough opinion, the district court[1] granted Qwest's motion for summary judgment on all claims and dismissed the case. INS now appeals from the district court's grant of summary judgment to Qwest, arguing principally that the district court should have applied the filed rate doctrine. We affirm.

I. *Background*

The background facts underlying this dispute are fully set forth in our prior opinion, *Qwest I*, and the district court's summary judgment opinion, *Iowa Network Serv., Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850 (S.D. Iowa 2005) ("*Qwest II*"). We instructed the district court on remand "to decide for itself whether the traffic at issue is subject to access charges pursuant to INS's tariffs." *Qwest I*, 363 F.3d at 695.

Upon remand, the district court, in granting Qwest's motion for summary judgment and dismissing INS's claims, made several important findings. First, with respect to the Iowa Utilities Board ("IUB"), the district court determined that (1) the IUB had jurisdiction to rule in the underlying action and was acting within its authority in rendering its rulings; (2) the IUB's rulings are consistent with, and do not violate, federal law; and (3) the IUB's orders must be upheld as a regulatory means of resolving the dispute.

Second, the district court found that (1) INS's amended federal tariff does not apply to the traffic at issue, as it

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[1] The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa.

undermines the thrust of the Telecommunications Act of 1996 ("the Act") and the authority of the IUB; (2) the Iowa tariff and the original federal tariff are inapplicable under the terms of the Act and the IUB's rulings; and (3) these determinations foreclose INS's self-help claims.

Lastly, the district court held that (1) equitable remedies are not available to INS; (2) a regulatory scheme is available to the parties as indicated by the IUB's decisions, and the parties must adhere to this framework before equitable remedies may be ripe for consideration; and (3) INS's unjust enrichment and implied contract/quantum meruit claims fail on the current record because of assorted substantive deficiencies.

INS appeals, seeking reversal of the district court's summary judgment ruling and enforcement of INS's tariffs pursuant to the filed rate doctrine, as codified in state and federal statutes.

II. *Discussion*

A. *Standard of Review*

> We review de novo a district court decision granting a motion for summary judgment, using the same standard as the district court and construing the record in the light most favorable to [] the nonmoving party. Summary judgment is appropriate only if the evidence establishes that there exists no genuine issue of material fact and that the moving party [] is entitled to judgment as a matter of law.

Johnson v. AT&T Corp., 422 F.3d 756, 760 (8th Cir. 2005) (internal citation omitted). "Federal courts have the ultimate

power to interpret provisions of the 1996 Act, including whether § 251(b)(5)'s reciprocal compensation requirement applies to the wireless traffic at issue here . . . ." *Qwest I*, 363 F.3d at 692; 47 U.S.C. § 252(e)(6).

B. *Enforcement of INS's Federal and State Tariffs*

INS argues on appeal, inter alia, that the district court erred in failing to apply the filed rate doctrine and allowing the IUB to displace the tariffs at issue. INS states that telecommunications tariffs have the effect of law and conclusively establish the terms under which a carrier must charge and the user must pay for telecommunications services covered by the tariff. INS claims that it was error for the district court to yield to the IUB ruling and refuse to enforce, and effectively invalidate, INS's tariffs. Further, INS contends that the district court erred in finding that INS's amended tariff was an effort to circumvent the negotiation/arbitration process codified in 47 U.S.C. § 252. INS asserts that even though the negotiation/arbitration process applies only to incumbent local exchange carriers ("ILECs"), and INS, Qwest, and the third-party wireless carriers cannot properly be considered ILECs, the district court held that the IUB was authorized to impose the negotiation/arbitration process on broader categories of carriers. INS states that this holding was erroneous because (1) this court has already held that the district court was not bound by the IUB's findings and (2) the IUB did not invoke any residual state law authority to find that INS could be properly required to undertake the negotiation/arbitration process. Next, states that the district court erred in relying on the Federal Communications Commission's (FCC) reciprocal compensation rules to support its refusal to enforce INS's tariffs. Lastly, INS asserts that, in the event this court upholds the district court's decision to dismiss INS's claims

regarding the violation of its tariffs, this court should remand this case to allow INS to proceed on its state law claims of unjust enrichment and implied contract.

INS's tariffs purportedly require Qwest to compensate INS for all traffic, regardless of origin, that Qwest transports to INS for completion over INS's access service trunks, including intrastate traffic. In this appeal, INS asserts that the FCC has exclusive jurisdiction over any claims regarding INS's federal tariff. In addition, INS states that the district court misconstrued the FCC's reciprocal compensation rules as barring enforcement of INS's state tariff. INS contends that the reciprocal compensation rules do not apply here because INS and Qwest are intermediary carriers. INS submits that reciprocal compensation rules more aptly apply to those carriers that originate and terminate the telephone calls. Because intermediary carriers, like Qwest and INS, by definition, neither originate nor terminate calls, they do not fit into the "reciprocal" relationship contemplated in the Act and defined in the FCC's rules. Consequently, INS submits that the FCC's rules permit an intermediary carrier like INS to charge another intermediary carrier like Qwest, rather than the originating carrier.

INS urges that § 251 imposes on ILECs, but not other carriers, the duty to negotiate an interconnection agreement in response to such a demand and to participate in arbitration if negotiations fail. INS states that neither it nor Qwest are ILECs for purposes of this case, meaning § 251 does not apply. Also, INS submits that the proper procedure for seeking to invalidate its tariffs is to file a complaint with the FCC because, under the filed rate doctrine, only the FCC can invalidate the tariff. Absent such action, INS states that the tariff governs the charges until the day the FCC requires changes or cancels the tariff.

Qwest responds by stating that the 1996 Act intended for state commissions, such as the IUB, to resolve open issues in telecommunications and that is exactly what happened in this case. Qwest urges that the IUB acted within its authority, and its decision does not violate federal law. As a result, the district court did not err in granting summary judgment based upon the IUB's ruling. Qwest further states that the filed rate doctrine, established by 47 U.S.C. § 203, is limited to "interstate and foreign" traffic. Because the communications that are the subject of INS's complaint are "intrastate," not "foreign or interstate," § 203 does not apply and hence the filed rate doctrine does not apply.

The district court found that the Act and the FCC's interpretive and implementing decisions have eliminated access charges, or tariffs such as INS seeks to impose, for local traffic. Thus, the district court held that the IUB's determination--that Qwest need not pay access charges because access charges are not available for "local" traffic--was consistent with federal law. Moreover, the district court found that because the FCC's reciprocal compensation rules do not directly address the intermediary carrier compensation to be paid, the IUB is authorized to resolve the question, as long as its resolution does not violate federal law. We agree.

As stated in *Qwest I*, "there are two types of charges which one carrier can extract from another for the provision of telecommunication services." 363 F.3d at 686. For *local* telephone service, "[u]nder the 1996 Act, the amount an ILEC can charge for allowing a competitor to use its infrastructure to deliver a local call is to be determined by an interconnection agreement negotiated . . . between the ILEC and the interconnecting carrier that has been approved by the state commission." *Id.* (citing 47 U.S.C. § 251(c)(1)). The access fee, or carrier's tariff, is charged "by common carriers

for use in carrying *long-distance communications* via their infrastructure, or toll services." *Id.* (citing 47 U.S.C. §§ 201, 202) (emphasis added).

Because this case concerns intraMTA [major trading area] traffic, which originates and terminates within the local calling area for cell phone users, we agree with the district court that this case involves local traffic, or *intrastate* telephone calls, and the manner of calculating the charges for connecting those calls between interconnecting carriers or transferring carriers. The IUB and the district court, guided by the orders and regulations of the FCC, determined that because the traffic at issue here is local, or *intrastate*, access fees or tariffs do not apply. When dealing with this type of traffic, the district court and IUB determined that reciprocal compensation agreements control and that the parties should negotiate or arbitrate--not unilaterally file tariffs.

The FCC differentiates between transport and termination of local traffic and access service for long-distance telecommunications.

> Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. . . . We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 1033-34, 1996 WL 452885 (1996). Moreover, the FCC has ruled that

> traffic to or from a CMRS [commercial mobile radio service] network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges. We conclude that section 251(b)(5) obligations apply to all LECs [local exchange carriers] in the same state-defined local exchange service areas . . .

Id. at 1036-37. Lastly, the FCC has stated that

> [a]lthough section 252(b)(5) does not explicitly state to whom the LEC's obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers . . . LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers.

Id. at 1041.

In this case, the calls originate and terminate within the same local MTA; therefore, they are considered to be "local" calls. According to the FCC's ruling, because these calls are "local," they are to be governed by reciprocal compensation arrangements. The rulings of the district court and the IUB are consistent with this ruling; thus, they do not violate federal law. As a result, the district court did not err in granting Qwest's motion for summary judgment.

The IUB found that the tariffs at issue in this case did not apply to the type of traffic involved in this dispute, namely local traffic. Consequently, neither the district court nor the IUB followed the filed rate doctrine. "Under [the filed rate]

doctrine, once a carrier's tariff is approved by the FCC, the terms of the federal tariff are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities' as between the carrier and the customer." *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000). INS repeatedly argues that the actions of the district court and the IUB nullify its federal tariffs. We disagree with INS's characterization. The IUB did not invalidate INS's tariffs; it simply stated that the charges as set out in INS's tariffs do not apply to the type of traffic at issue in this case. This determination does not mean that the tariff does not apply to interstate or foreign traffic. The tariff is still enforceable for traffic as specified in 47 U.S.C. §§ 202, 203. Because the traffic in this case is "local," and therefore covered by 47 U.S.C. §§ 251, 252, INS's tariff is not applicable.

In the absence of a clear mandate from the FCC or Congress stating how charges for this type of traffic should be determined, or what type of arrangement between carriers should exist, the Act has left it to the state commissions to make the decision, as long as it does not violate federal law and until the FCC rules otherwise.

> The goal of preserving a role for the state regulatory commissions is reflected in a number of provisions in the [1996 Act]. Congress expressly left with the states the power to enforce 'any regulation, order, or policy of a State commission that . . . establishes access and interconnection obligations of local exchange carriers; . . . is consistent with the requirements of this section; and . . . does not substantially prevent implementation of the requirements of this section and the purposes of this part.'

Global Naps, Inc. v. Mass. Dep't of Telecomm. & Energy, 427 F.3d 34, 46-47 (1st Cir. 2005) (quoting 47 U.S.C. § 251(d)(3)). As the IUB acted within its power under statute, we find no error.

Next, we examine the district court's finding that reciprocal compensation applies to arrangements between INS and Qwest. In *Illinois Bell Telephone Co. v. WorldCom Tech, Inc.*, 179 F.3d 566 (7th Cir. 1999), the court held that just because "the Act does not *require* reciprocal compensation for calls to ISPs [Internet service providers] is not to say that it *prohibits* it. The Act simply sets out the obligations of all local exchange carriers to provide for reciprocal compensation . . . ." *Id.* at 573 (emphasis in original). The court found that "the ICC's conclusion--that reciprocal compensation should apply to traffic Ameritech bills as local traffic--does not violate the Act or the FCC's interpretation of the Act." *Id.* We reach the same conclusion in this case. The fact that reciprocal compensation is only explicitly provided for with respect to ILECs does not mean that the Act prohibits reciprocal compensation arrangements for LECs. In fact, the FCC stated that "LECs have a duty to establish reciprocal compensation arrangement with respect to local traffic originated by or terminating to any telecommunications carriers." *Local Competition Provisions*, 11 FCC Rcd. 15499 at ¶ 1041. Therefore, because there is no prohibition from Congress or the FCC, we hold that the IUB was within its jurisdiction to rule as it did.

Lastly, we note the FCC's stated desire to move away from tariffs and toward negotiation and arbitration in order to facilitate market competition. *See In the Matter of Developing a Unified Intercarrier Compensation Regime T-Mobile et al.*, 20 FCC Rcd. 4855, 2005 WL 433200 (2005) (holding that the FCC is amending its rules to make clear its preference for

contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff.); *MCI WorldCom, Inc. v. Fed. Comm. Comm'n*, 341 U.S. App. D.C. 132, 209 F.3d 760 (D.C. Cir. 2000) (stating that the Commissioner tentatively concluded that tariffing was no longer necessary). "The Commission has long been concerned that the necessity of filing tariffs hinders competitive responsiveness . . . [and] the filed-rate doctrine has been used by the carriers as a shield to avoid individual contract negotiations with large and small users, thereby reducing competition among carriers." *MCI WorldCom*, 209 F.3d at 764. Moreover, as pointed out by the FCC, "no provision of the Communications Act except § 203(a) requires tariffing, and no provision gives a carrier a positive right to file a tariff, so if it forbears from applying § 203(a) the Commission's staff is not obliged to accept filings."

C. *Implied Contract and Unjust Enrichment*

INS appeals the district court's dismissal of its state law claims of unjust enrichment and implied contract (quantum meruit). However, INS concedes that it cannot prevail on these claims if they are covered by an express contract, either in the form of a tariff or a reciprocal compensation agreement. Because we have already concluded that the IUB acted within its authority in directing INS and Qwest to negotiate within the reciprocal compensation regime, the regulatory process contemplates that an express contract will ultimately result, and for this reason the district court did not err in dismissing INS's state law claims of unjust enrichment and implied contract.

III. *Conclusion*

For these reasons, we affirm the district court's grant of summary judgment, based upon the IUB's determinations, because its rulings are not contrary to federal law.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION

No. 4:02cv-40156

[Filed August 17, 2005]

IOWA NETWORK SERVICES, INC., Plaintiff,	)
vs.	)
QWEST CORPORATION, Defendant.	)

JUDGES: JAMES E. GRITZER, United States District Judge.

ORDER ON INITIAL BRIEFS AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This action is presently before the Court on the initial briefing of the parties (Clerk's Nos. 50, 54) filed pursuant to this Court's July 6, 2004, scheduling order. Qwest chose to pursue summary judgment as part of this process, and therefore the Court will analyze the parties' arguments under the summary judgment standard. Attorneys for Plaintiff are Lawrence P. McLellan, James U. Troup, Tony S. Lee, James

H. Lister, and David E. Lampp; attorneys for Defendant are Sheila K. Tipton, Dennis W. Johnson, Amy M. Omvig, and Roy E. Hoffinger. The parties did not request a hearing, and the Court finds a hearing is not necessary. Accordingly, the Court considers the issues presented in the initial briefings and in Qwest's motion for summary judgment to be fully submitted and ready for ruling.

PROCEDURAL HISTORY

Plaintiff Iowa Network Services, Inc. ("INS"), initiated the present action against Defendant Qwest Corporation ("Qwest") by filing a Complaint and Demand for Jury Trial with this Court on March 27, 2002. Qwest successfully moved to dismiss,[1] only to have the Eighth Circuit, in a ruling dated April 7, 2004, reverse the dismissal and remand for further proceedings.[2] On December 2, 2004, this Court filed an Order on Pending Motions (Clerk's No. 82), granting Plaintiff's Motion to Amend and determining the Court's review was not limited to "judicial review" of an agency decision, "as INS' Complaint is an original action and not an appeal of the administrative agency decision requiring a deferential judicial review of that decision," and as a result, the record is not limited to the administrative record. Order on Pending Motions at 31, 36-37. The parties subsequently filed the pending briefs/motions in order to clarify and narrow the issues for trial.

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[1] *See Iowa Network Services, Inc. v. Qwest Corp.*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324 (S.D. Iowa Oct. 9, 2002) (hereinafter "*INS v. Qwest I*").

[2] *See Iowa Network Services, Inc. v. Qwest Corp.*, 363 F.3d 683 (8th Cir. 2004) (hereinafter "*INS v. Qwest II*").

In a somewhat convoluted briefing plan, both parties filed initial briefs on August 11, 2004, with Qwest's brief being a motion for summary judgment. The parties were then given opportunity to resist/respond to the opposing parties' brief, and again to reply to the filed response/resistance. After this Court granted Plaintiff's Motion to Amend in the Court's Order on Pending Motions, the Court allowed the parties additional opportunity to "provide the Court with any necessary supplement to their prior briefing . . . [with t]hese briefs . . . limited to the new issues raised in the Amended Complaint, i.e., the self-help and quantum meruit counts." Order on Pending Motions at 13. The parties completed this briefing, including responses, on December 27, 2004. The Court then took the matter under advisement, accepting notice of supplemental authority, including responses, on two occasions in March, 2005. The Court now considers the matter fully submitted.

The purpose of this initial briefing was to allow the Court to become aware of the issues and rule on any initial matters, thereby narrowing the focus of the case and clarifying the issues as the action proceeds toward trial. Because Qwest chose to pursue summary judgment as part of this process, the Court will analyze the parties' contentions under the summary judgment standard as set out below.

BACKGROUND FACTS

A. Preliminary Statement

This case concerns intercarrier compensation for telephone calls ("traffic") placed by customers of third-party commercial mobile radio service ("CMRS") providers (i.e.,

"wireless carriers")[3] to end-user customers served by third-party Incumbent Local Exchange Carriers ("ILECs")[4] located in the same calling area.[5] The calls at issue are (1) placed (i.e., "originated") by end-user customers of third-party CMRS wireless carriers, (2) delivered by the wireless carriers to Qwest as an intermediate, or transiting, carrier, (3) transported approximately six blocks by Qwest and delivered to INS, a second intermediate, or transiting, carrier, (4) transported by INS to the ILECs serving the called parties, and (5) routed and delivered (i.e., "terminated") by the ILECs to the premises of the called parties, the ILECs' end-user customers. Qwest and INS are involved in the transport of these calls because the originating third-party wireless carriers and the terminating ILECs have elected to "interconnect" their networks "indirectly" to permit calls between their end-user customers.[6]

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[3] In the telecommunications industry, wireless carriers are called Commercial Mobile Radio Service or "CMRS" providers who essentially offer one-way or two-way radio communication services between land stations and mobile receivers. *See* 47 C.F.R. § 20.3.

[4] *See* 47 U.S.C. § 251(h)(1) (defining an incumbent local exchange carrier to mean with respect to a given area, the local exchange carrier that "on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in that area").

[5] Whether this traffic is "local" or "long distance" is an issue resolved by the Board and attacked by INS in this action.

[6] The term interconnection is used by regulators and carriers to refer to the physical linking and use of networks owned by different carriers to permit customers of one carrier to call customers of another carrier. Interconnection may be either direct or indirect.

B. Plaintiff's Action

In its Amended Complaint before this Court, INS states, "This is a collection action to recover unpaid charges for telecommunication services that Qwest has received and continues to receive while refusing to pay INS the lawful charges for these services." INS then seeks payment under both federal and Iowa tariffs or, in the alternative, for unjust enrichment and implied contract/quantum meruit. INS has also brought a claim for self-help in violation of the Communications Act. Further, as part of its action, INS alleges the Iowa Utilities Board ("IUB" or "the Board") issued a series of orders in docket number SPU-00-7 that violate federal law. Specifically, INS asserts the IUB misinterprets and misapplies various provisions of the Telecommunications Act, section 251 in particular. The Board's determinations that are being challenged include the following: (a) wireless calls that are placed and received by subscribers of different carriers located in the same major trading area ("MTA")[7] are classified as "local", and are not

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"Interconnection is direct when the carrier's facilities or equipment is attached to another carrier's facilities or equipment," and "indirect when the attachment occurs through the facilities or equipment of an additional carrier." Order on Reconsideration, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 15 FCC Rcd. 17806, at ¶ 85 n.198 (2000).

[7] For wireless communications, the country is divided into Major Trading Areas ("MTAs") rather than local exchange areas. Thus, in the field of wireless telecommunications, the MTA is the local calling area for wireless telecommunication providers. *See* 47 C.F.R. § 51.701(b)(2), with MTAs determined pursuant to 47 C.F.R. § 24.202. "IntraMTA" wireless traffic originates and

subject to long distance access charges, notwithstanding the fact that the originating and terminating carriers are interconnected indirectly through one or more additional carriers; (b) the termination of such calls is subject to the "reciprocal compensation" provisions of 47 U.S.C. § 251(b), as implemented through negotiated or arbitrated interconnection agreements between the originating and terminating carriers pursuant to 47 U.S.C. § 252; and (c) Qwest, which provides an indirect interconnection and transiting service between the CMRS provider and INS, is not responsible for payment to INS of access charges or other compensation for its transport or termination of calls placed by subscribers of the CMRS providers.

Qwest has countered that the Board's determinations do *not* violate federal law and must therefore be upheld and enforced by this Court. Qwest further contends INS cannot circumvent the result of the Board's determinations through unilaterally filing a federal tariff purporting to dictate and govern the rates, terms, and conditions of the parties' interconnection considering the Board ordered the parties to negotiate and, if necessary, arbitrate an interconnection agreement that would set forth and govern the rates, terms,

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terminates in the same MTA. "InterMTA" wireless traffic originates in one MTA and terminates in another. "The determination of whether a call is interMTA or intraMTA is made when the call is first connected, although a wireless user may travel into another MTA during the duration of the call." *INS v. Qwest II*, 363 F.3d at 687 n.2.

In Iowa, the MTA for wireless telecommunications is called the Des Moines MTA and encompasses nearly all of the State of Iowa, as well as small parts of neighboring states, including Michigan, Illinois, Missouri, Nebraska, and South Dakota.

and conditions of the parties' relationship. Qwest contends the amended federal tariff is unauthorized and further that neither the federal nor state tariffs are applicable to the traffic at issue.

C. Telecommunications in Iowa

Due to the largely rural nature of Iowa, telecommunications service in much of the state has historically been provided by small independently owned companies located in and serving small designated geographic areas. These phone companies provide local telephone services, called "telephone exchange service", within a defined geographic area known as the local exchange. Providing such services made these local phone companies "local exchange carriers" ("LECs").[8] Iowa is served by approximately 147 small local phone companies ("Independent Local Exchange Carriers" or "Independent LECs") that provide local telephone service within specific geographic regions. These Independent LECs are generally located in the rural areas of the state and many, if not all, of these Iowa LECs were independently owned.

Qwest, formerly known as U.S. West Communications, is the former Regional Bell Operating Company in the State of Iowa. Qwest, which provides local telephone services to customers throughout a fourteen-state area, is also an LEC, though not independently owned and not functioning in such capacity with respect to the traffic at issue here. *See INS v. Qwest II*, 363 F.3d at 694 n.3. While differing greatly in size,

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[8] *See* 47 U.S.C. § 153(26) (defining "LEC" as any person that is engaged in the provision of telephone exchange service or exchange access).

Qwest and the independent LECs provide basically identical services, though Qwest also offers long distance services.

Typically, LECs own the wires, computer switches, and other facilities necessary to provide telecommunications service to their subscribing customers. Access services or exchange services were available for purchase to competing carriers, thereby allowing purchasers to send or receive calls from a subscriber over the facilities owned and maintained by another LEC. The major benefit of purchasing access was that a company could reach specific phone customers by purchasing access to the LEC circuits without having to build facilities throughout an area served by another LEC.

In 1987, most of the independent LECs then in existence in Iowa joined together to form Iowa Network Services ("INS"). The major benefit of this formation was that calls placed to or from a customer served by one of the companies in INS could now utilize INS' network to reach whichever independent LEC the customer subscribed to through INS' one centralized network. As was customary, INS charged access fees to use its network. These fees were set forth in tariffs on file with the Federal Communications Commission ("FCC"), which governed INS' interstate services, and tariffs on file with the IUB,[9] which governed INS' intrastate services. Qwest is not a member of INS.

As long as telephone calls were placed from traditional land-based wire connected phones, the system of ordering access to the INS network detailed above seemingly worked

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[9] The IUB is the board charged with governing telecommunications in Iowa, so far as it is granted the authority to do so.

well. Technology had an impact on the development and popularity of wireless cellular phones, however, and as the popularity of wireless phones grew, so too did issues and disputes surrounding the access services and charges associated with accessing the INS network, as "[t]raditional notions of 'local exchange areas' do not fit neatly into this new world of wireless communications." *INS v. Qwest II*, 363 F.3d at 687.

For wireless communications, the country is divided into Major Trading Areas (MTAs) rather than local exchange areas. Thus, the local calling area for a cell phone user is determined by the cell phone user's MTA. *See* 47 C.F.R. § 51.701(b)(2). The MTA for Iowa is the Des Moines MTA, which encompasses virtually all of Iowa and small portions of its neighboring states. IntraMTA traffic originates and terminates within the same MTA, while interMTA traffic originates in one MTA and terminates in another.[10]

Traditionally, when a call begins at a third-party wireless caller's phone, the call is connected by radio signal to the wireless service provider. The call then travels over the wireless carrier's network until it interconnects with Qwest's network/facilities. Initially, Qwest identified for INS the number and type of trunks[11] that Qwest would like INS to provide. Qwest's requests for trunks from INS were set forth on written Access Service Requests ("ASRs"). Through these

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[10] The determination of whether a call is interMTA or intraMTA is made when the call is first connected, although a wireless user may travel into another MTA during the duration of the call.

[11] A trunk is a transmission path connecting two switching systems used to establish an end-to-end connection.

ASRs, Qwest ordered access trunks from INS. Qwest then negotiated with CMRS carriers to provide them with what it calls a "transit" service after the third-party CMRS provider's calls interconnect with Qwest's network. Qwest then transports the call from the subscriber of the CMRS wireless carrier on Qwest's network to a point of interconnection with INS. INS then carries the call over its trunks to a point of interconnection with the independent LEC network serving the person being called.

Qwest's network collects both wireline traffic and wireless traffic and directs this traffic to INS.[12] The wireline and wireless traffic coming from Qwest include both interstate and intrastate telephone calls. Qwest "commingles", or mixes together, this wireline and wireless traffic before transmitting it to INS. Because of the commingling of calls by Qwest, the identity of the wireless or other carrier originating each call cannot be readily determined by INS' equipment. Consequently, INS informed Qwest at the outset of this dispute in 1999, Qwest's commingling of calls makes it infeasible for INS to directly bill the wireless carriers, which originate calls for INS' transiting service.

In short, as relevant to the present action, Qwest delivers to the INS network wireless phone calls originated by customers of third-party CMRS carriers who are connected to subscribers of independent local exchange carriers, and which calls originate and terminate in the same MTA. Until April 1999, Qwest paid the tariffed rates for taking the wireless-originated calls from non-Qwest customers and delivering

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[12] Wireline traffic is the traditional communication method that uses wires or cables to transmit telephone calls. Wireless traffic is the use of cellular telephones and radio to transmit telephone calls.

them to the independent LECs via the INS network pursuant to either relevant INS intrastate tariffs filed with the IUB or INS interstate tariffs on file with the FCC.[13] Since then, Qwest has refused to pay INS, and now INS seeks compensation, both past and future, for transiting and terminating the calls Qwest delivers to the INS network.

D. The Telecommunications Act and FCC Implementing Decisions

Congress enacted the Telecommunications Act ("the Act" or "the 1996 Act")[14] in February 1996, greatly amending the Communications Act of 1934. Prior to the Act, when a new company entered a geographic area, it routinely had to compete with an established LEC for customers in that particular service area.[15] The Act was intended to enhance competition in the market for local telephone service, *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999), because "[e]ven after the 1980s breakup of the AT&T telecommunications monopoly, which, *inter alia,* divested AT&T of its local exchange carriers, local telephone service continued to be viewed and operated as a natural monopoly, with state utility boards, or

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[13] Qwest also paid termination fees to the ILEC terminating the call pursuant to the respective independent ILECs' tariffs.

[14] *See* 47 U.S.C. §§ 151-615 (2001).

[15] Prior to the 1996 Act, the FCC issued several decisions related to interconnection between wireless carriers and wireline local telephone companies (i.e., LECs) pursuant to section 201 of the Communications Act of 1934, 47 U.S.C. § 201. The pre-1996 Act landscape of telecommunications law is discussed further *infra*, at section D.1.

commissions, giving one local telephone service provider exclusive coverage of a given geographic area." *INS v. Qwest II*, 363 F.3d at 685. To break down barriers to competition in the local phone market, the Act requires all carriers to facilitate local competition by sharing existing networks and facilities with any new competitors. *Id.* at 685-86.

The Act "is a unique hybrid of statutory and common law that divides decision making authority between the Federal Communications Commission ("FCC"), State commissions, and private parties." *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 72 F. Supp. 2d 1043, 1044 (E.D. Ark. 1999), *rev'd on other grounds*, 225 F.3d 942 (8th Cir. 2000). The 1996 Act "thrust the federal government into the local telephone market regulatory arena, which has previously been the exclusive domain of the states." *INS v. Qwest II*, 363 F.3d at 686 (citing *MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania Serv.*, 271 F.3d at 491, 497 ("The Act requires that local service, which has previously been operated as a monopoly overseen by the several states, be opened to competition according to standards established by federal law."). In practice, the Act may be characterized as schizoid, not in the psychological sense, but for the fact that it allows under some circumstances for the co-existence of disparates. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 397 ("It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars."). As the Eighth Circuit so presciently recognized, it is this "new relationship between the federal government (through the . . . FCC), the federal courts, and the state commissions in regulating local telephone markets

and the competing providers of telephone services in those markets [that] is at the heart of this case." *INS v. Qwest II*, 363 F.3d at 686. The 1996 Act, subsequent determinations by the FCC, various cases resolved by United States District Courts, and indeed the briefs filed in this action, dramatically illustrate we labor in the early stages of a slow evolution.

This new structure governs the telecommunications companies doing business in Iowa. As a general matter, but not without exception, the FCC regulates interstate telephone service, while the IUB oversees intrastate service. *Compare* 47 U.S.C. § 152 (2002) (defining FCC's jurisdiction); *see also* 47 U.S.C. §§ 201-205 (indicating that the FCC has jurisdiction over interstate communication), *with* 47 U.S.C. § 253(b) (relating to State regulatory authority and discussing that nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, and ensure the continued quality of telecommunications services); *see also* 47 U.S.C. § 261(b)-(c) (indicating Congressional intent with respect to existing and additional state requirements that "nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services . . . as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations").

Pursuant to this regulatory framework, INS, as a common carrier of telephone services, must file tariffs with the FCC, setting forth a schedule of charges for the various interstate services it provides. *See* 47 U.S.C. § 203. For services provided in the state of Iowa, the IUB regulates the telecommunications industry and other public utilities through tariffs, or regulations of utility rates and services. *See Teleconnect Co. v. U.S. West Communications, Inc.*, 508

N.W.2d 644, 646 (Iowa 1993); *see also* Iowa Code § 476.1 (delegating to the utilities board the authority to "regulate the rates and services of public utilities"). Every public utility doing business in Iowa, including INS, must "file with the board tariffs showing the rates and charges for its public utility services" under this regulatory scheme, and every public utility "shall keep copies of its tariffs open to public inspection under such rules as the board may prescribe". *Id.* (citing Iowa Code § 476.4). Based on this structure, the Iowa Legislature implemented various rules and definitions found in the Iowa Administrative Code to guide the Board in regulating the telecommunications industry in Iowa. *See*, 199 Iowa Adm. Code 38.1 (1).

To achieve the purposes of promoting and fostering competition, the 1996 Act required all carriers "interconnect, directly or indirectly," with other carriers. 47 U.S.C. § 251(a)(1). The Act also espoused interconnection agreements, requiring ILECs to agree, upon request, to provide interconnection to a competing carrier pursuant to the interconnection agreement approved by a state public utility commission rather than pursuant to a tariff. *See* 47 U.S.C. §§ 251(c)(1) and 252. The Act further imposes a duty on all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications" consisting of local traffic. *See* 47 U.S.C. § 251(b)(5).

Thus, the Act's goal of fostering competition is furthered by allowing carriers to compete with ILECs by utilizing the ILECs' telecommunications networks, rather than forcing the competing carriers to build their own networks before serving a given area. The originating and terminating parties are then compensated according to the roles they play in the transport and termination of the traffic as provided in the interconnection agreement between the parties.

Due to the complexity of the Telecommunications Act, the FCC created an order directing the implementation of the Act. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd 15499, at ¶¶ 1035-1045 (1996) (hereinafter *"Local Competition Order"*). "The order was in response to the 1996 Act's direction to the FCC to "establish regulations to implement the requirements' of § 251, that is, the requirements to advance local competition.'" *INS v. Qwest II*, 363 F.3d at 687 (quoting *GTE South, Inc. v. Morrison*, 199 F.3d 733, 737 (4th Cir. 1999) (quoting 47 U.S.C. § 251(d)(1))).

In the *Local Competition Order*, the FCC addressed the applicability of the 1996 Act to particular types of calls (including calls originated by end-user customers of CMRS providers), of the Act's provisions regarding "transport"[16] and "termination", and the formation of interconnection agreements. *Local Competition Order*, at ¶¶ 1035-1046. Relevant to this case, the *Local Competition Order* specifically addressed the billing of calls that a wireless carrier delivers to an LEC for termination, where the call both originates and terminates in a geographic area, i.e., the Major Trading Area. *See id.*

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[16] In its discussion of "transport", the FCC noted that "[m]any alternative arrangements exist for the provision of transport between the two networks," and that these arrangements include "dedicated circuits provided either by the incumbent ILEC, the other local service provider, separately by each, or jointly by both," and "facilities provided by alternative carriers." *Local Competition Order*, at ¶ 1034.

On appeal from an earlier decision in this case, the Eighth Circuit observed the following regarding the conclusions of the *Local Competition Order*:

> The FCC decreed that "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5) [requiring LECs to establish reciprocal compensation arrangements], rather than interstate and intrastate access charges." *[Local Competition Order]* at ¶ 1036. The FCC also found that "the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate inter-exchange traffic." *Id.* ¶ 1034. "Interexchange traffic" is a term of art which correlates to what consumers would traditionally consider to be "long-distance" telephone service for which "toll charges" are incurred; an interexchange carrier (IXC) is a long-distance carrier who provides intrastate or interstate long-distance communications services between local exchange areas.

INS v. Qwest II, 363 F.3d at 687-88.

In early 1999, Qwest stopped paying access charges to INS for the intraMTA wireless traffic of third parties that Qwest delivered to the independent LECs via the INS network based on the FCC determinations made in the *Local Competition Order*. Qwest contends the FCC determined that traffic between an LEC and a CMRS provider which at the beginning of the call originates and terminates within the same MTA is local traffic and therefore not subject to access charges. *See Local Competition Order*, at ¶ 1036.

E. Decisions of the IUB

As delineated above, this case involves the manner telephone traffic is exchanged by small local rural telephone companies, also known as independent or rural ILECs,[17] and wireless telephone companies through the telephone network owned and operated by Qwest. In April 1999, Qwest advised INS and the terminating ILECs that, as a transiting carrier, it was not responsible for paying "access" charges or other compensation for their transport and termination of calls placed by customers of third-party CMRS providers. INS and the terminating ILECs disagreed with Qwest's position.

Consequently, on May 19, 2000, Qwest filed a petition with the IUB for a declaratory order regarding the exchange of local traffic between cellular telephone companies and other local service providers using Qwest's facilities. The Board docketed the petition as a formal contested case proceeding pursuant to Iowa Code §§ 17A.12 and 476.3, and

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[17] Qwest is also an ILEC but is not a independent or rural and thus not a "rural ILEC." *See INS v. Qwest II*, 363 F.3d 683, 694 n.3 (8th Cir. 2004) ("Although Qwest serves as a LEC in certain communities to the extent it provides local telephone service, and may even be an ILEC, . . . it served neither function with respect to the traffic here at issue. The CMRS traffic was not directed to any of Qwest's local telephone customers; rather, Qwest served merely as an intermediary carrying the traffic on its route to INS's member companies' local telephone customers."). There is also no evidence that INS is a rural ILEC under the definitions found in the 1996 Act. Indeed, this issue was not presented to the Board in the underlying hearings of this dispute.

identified as Docket No. SPU-00-7.[18] The Board granted motions to intervene filed by INS, the Rural Iowa Independent Telephone Association ("RIITA"), the Iowa Telephone Association ("ITA"),[19] several Iowa independent ILECs, and several CMRS providers.[20]

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[18] Qwest's petition was based on the FCC determinations made in its *Local Competition Order*. After examining Qwest's request, the IUB found numerous facts to be in dispute and also found that "broad" issues regarding the proper treatment of "transit traffic" or traffic carried by intermediary carriers existed. As a result, the IUB refused to issue Qwest a declaratory order.

Instead, on June 23, 2000, the IUB opened Docket No. SPU-00-7 to address specific issues dealing with transit traffic and related issues. INS was allowed to intervene; thus, INS, Qwest, RIITA, and others became parties to the action before the Board. According to the IUB, this proceeding was to provide for a full and complete record since the proceeding would establish certain policies regarding transit traffic that could impact the entire telecommunications industry in Iowa.

[19] Both RIITA and ITA are trade associations of Iowa LECs. As briefly noted earlier, RIITA has brought its own suit against the IUB.

[20] In addition to the declaratory ruling, Qwest also sought a refund of access charges it paid to INS for the 24-month period prior to April 1999. In turn, INS sought payment of the access charges Qwest refused to pay after April 1999. Ultimately, the Board declined to order a refund to Qwest, because it determined the parties had agreed to the rates previously charged at least until Qwest formally disputed them. The Board's decision did, however, provide that compensation for the use of INS' facilities should apply prospectively from April 1999 and should be included in the negotiations for interconnection agreements.

All parties involved in the IUB action had a chance to file initial briefs and reply briefs, and the Board held a "technical workshop". Hearings presided over by all three Board members lasted several days and concluded on April 19, 2001. On November 26, 2001, the IUB issued a Proposed Decision and Order (hereinafter "*IUB Proposed Decision and Order*").

Briefly, the Board's decision concerns telephone traffic between a cellular telephone customer and a customer of an independent telephone company. Prior to the decision of the Board, if the cellular customer placed a call to a customer of an independent telephone company, the cellular companies delivered the call to Qwest. Qwest then transported the traffic to INS, a centralized equal access service provider. INS then carried the call to the independent telephone company for connection to the called customer. Qwest charged the wireless companies a transit fee for carrying the traffic. INS charged an access service fee to Qwest for carrying the traffic. The independent telephone company then assessed access charges to Qwest for terminating the call.

In the proposed decision and order issued November 26, 2001, by the IUB, the Board's Presiding Officer found that the cellular traffic at issue is local and that access charges do not apply to such traffic. This decision was made pursuant to the Board's understanding of orders issued by the FCC. The IUB held cellular carriers are entitled to interconnect directly with the independent carriers on a bill-and-keep[21] basis

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[21] "'[B]ill-and-keep arrangements are those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network,' 47 C.F.R. § 51.713(a), and are

pursuant to Board and FCC rules. The decision further found Qwest is entitled to compensation for carrying the traffic but has no obligation to pay access or other terminating fees. The Board also concluded that the CMRS wireless carriers could use INS facilities for an indirect connection to the independent companies, but that INS is entitled to compensation for providing those services. The Board found it could not determine the appropriate rate for INS' services on the record before it. As a result, the Board directed the parties to negotiate an interconnection agreement regarding these matters pursuant to the Telecommunications Act.[22] Board arbitration was available to resolve any issues the parties were unable to resolve by negotiation.

Some of the parties appealed the proposed decision to the Board. The Board affirmed the proposed decision by order issued March 18, 2002 (hereinafter "*IUB Order Affirming*

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appropriate when 'the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction,' *id.* § 51.713(b)." *INS v. Qwest II*, 363 F.3d at 688.

[22] The Eighth Circuit characterized the Board's action in the following manner:

> The IUB, *in a directive short of an order*, strongly 'encouraged' the parties involved to resolve the dispute through negotiations conducted under 47 U.S.C. § 252(a) by reaching an interconnection agreement permitting reciprocal compensation, and if the negotiations proved unsuccessful, through an arbitrated agreement arranged by the Board pursuant to § 252(b).

Rural Iowa Indep. Tel. Ass'n v. Iowa Utils. Bd., 362 F.3d 1027, 1029 (8th Cir. 2004) (emphasis added).

Proposed Decision"), thereby making the Board's decision final. One party, ITA, filed an application for rehearing, which the Board denied by order issued May 3, 2002 (hereinafter "*IUB Order Denying Rehearing*"). Another party, RIITA, then sought judicial review of the Board's decision in the Polk County District Court (Iowa) pursuant toIowa Code § 17A.19 but never served the petition on the Board. RIITA voluntarily dismissed that action on June 21, 2002, and subsequently brought filed a complaint in this Court, and that action has proceeded concurrently with the present action brought by INS. INS also opted not to appeal the final Board decision in the Iowa state courts, *see* Iowa Code §§ 476.13, 17A.19, or bring an action challenging the Board's decision in federal court (like RIITA). Instead, INS brought the present "rather ordinary collection action," *INS v. Qwest II*, 363 F.3d at 689, in this Court.

Despite this being a "rather ordinary collection action", the determinations of the IUB play a pivotal role. Relevant to the present action, the Board made the following determinations in its rulings:

- Under the FCC's orders, intraMTA traffic is classified as "local" and not subject to long distance "access" charges (*IUB Proposed Decision*, at 13, 21; *IUB Order Affirming Proposed Decision*, at 2);

- With regard to the traffic at issue, Qwest is not acting as an "IXC" providing "long distance" service to end users with whom it has a billing relationship, but is providing an indirect connection for local traffic (*IUB Proposed Decision*, at 13); accordingly, Qwest "has no obligation to pay access or other termination fees" (*IUB Order Affirming Proposed Decision*, at 2);

- When Qwest refused in 1999 to continue paying access charges for traffic originated by third-party CMRS providers, it put INS and the terminating ILECs "on notice that it no longer believed it was ordering" access services (*IUB Proposed Decision*, at 37-38);

- Rates and other terms applicable to such arrangements, including proposals that transit and other traffic should be delivered over "separate" trunks, and "the means by which interMTA [i.e., long distance] calls should be distinguished [from] intraMTA [i.e., local] calls" are "good examples" of the kinds of issues that can best be addressed through the Act's negotiation and arbitration process *(IUB Proposed Decision*, at 30; *IUB Order Affirming Proposed Decision*, at 20);[23]

- The results of the negotiations (and arbitrations, if necessary) would relate back to April 1999 (*IUB Proposed Decision*, at 38).

These issues, while not directly challenged in the present case (unlike the separate but related action filed by RIITA against the IUB directly challenging the Board's determinations), are relevant and potentially dispositive to the outcome of this case.

Prior to engaging in an analysis of the issues presented to the Court by the parties, the Court finds the IUB exercised the

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[23] The Board also held that transiting carriers used by CMRS providers or ILECs to exchange traffic should be parties to the negotiations and Board arbitrations. *IUB Proposed Decision*, at 33.

proper authority in rendering the decisions associated with Docket No. SPU-00-7. While these rulings are not preclusive, *see INS v. Qwest II*, 363 F.3d at 693 (holding "the district court erred in giving preclusive effect to the IUB's determination"), the Court finds the Board's determinations extremely persuasive given the Board's province and experience resides in regulation of the telecommunications industry. Consequently, the Court gives respectful consideration to the Board's determinations so far as the Board was acting within its authority and its decisions conform with federal law.

F. INS' Tariffs

While the IUB determinations are important but corollary issues in the present action, this Court must ultimately "decide for itself whether the traffic at issue is subject to access charges pursuant to INS's tariffs." *INS v. Qwest II*, 363 F.3d at 695. At issue are three tariffs filed by INS.

The rates, terms, and conditions governing INS' access services for interstate wireline calls are set forth in a tariff INS filed with the FCC, known as Tariff F.C.C. No. 1("FCC Tariff"). The FCC Tariff has governed the INS-Qwest relationship with respect to interstate wireline calls from its inception on April 26, 1989, and, INS argues, continues to do so.

The FCC Tariff was amended on November 11, 2000 ("Amended FCC Tariff"). The rates, terms, and conditions governing INS' access services from November 11, 2000, to the present for both interstate and intrastate calls placed by a CMRS subscriber are set forth in the Amended FCC Tariff.

The rates, terms, and conditions governing INS' access services for non-wireless or wireline intrastate calls are set forth in a tariff filed with the Iowa Utilities Board, known as Iowa Tariff No. 1 ("Iowa Tariff"). The rates, terms and conditions governing INS' access service billed to Qwest before November 11, 2000, for intrastate wireless calls are also set forth in the Iowa Tariff.

According to INS, the rates, terms, and conditions in the FCC Tariff, the Amended FCC Tariff, and the Iowa Tariff are binding on Qwest. As tariffs approved by the appropriate regulators, the FCC Tariff, the Amended FCC Tariff, and the Iowa Tariff have the force and effect of law and are not ordinary contracts.

G. The Present Action

In a previous ruling, this Court held the following with respect to the scope of review in this case:

> The Court concludes the evidence in this case should not be limited to the administrative agency record. INS did file an action seeking enforcement of its tariffs, an original action it is entitled to bring and have heard *de novo,* especially considering the Board did not even deal with the tariff issue in its proceedings. Moreover, there are other claims in the INS Complaint that also warrant a trial *de novo.* As evidenced by INS' list of open issues, there are many factual and legal determinations before this Court that were not before the Board. The Eighth Circuit, in finding the Board's determinations do not have a preclusive effect on this Court, has ordered this Court to "decide for itself" the issues in this case. This Court will be limited in its ability to do this, based on

> the issues in the present action, if the Court is constrained to consider only the material in the Board's administrative record.
>
> In short, while the ultimate validity of the IUB decision is central to the matters now before this Court, the present action involves much more than a judicial review of the IUB's decision. It is not merely an appeal clothed as an original action even though the Court may be required to review certain aspects of the Board's decision. Accordingly, the Court will deny Qwest's motion to limit the Court's review to the administrative record of the IUB.

Order on Pending Motion, at 31. Accordingly, the Court must look to and analyze the decisions of the IUB as it relates to the tariff claims brought by INS. In so doing, the Court must analyze whether the decisions of the IUB violate federal law, and whether INS' tariffs are valid and binding on the traffic at issue.

ANALYSIS

Review and consideration of the issues in this case involves an unresolved area of the law, complicated legal issues and arguments that dwell substantially on interpretation of and extrapolation on the 1996 Act, as well as prior law, existing opinions and clarifications by the FCC, administrative rulemaking still on the horizon, and varying court decisions. Accordingly, the Court is compelled to provide significant detail with regard to the arguments of the parties. While this necessarily creates a lengthy order, no more condensed method seems adequate to the task of demonstrating both the nature of the dispute and the Court's resolution of that dispute.

A. Standard for Summary Judgment

"[C]laims lacking merit may be dealt with through summary judgment under Rule 56." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be rendered

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

To avoid summary judgment, the nonmoving party must make a sufficient showing on every essential element of its case for which it has the burden of proof at trial. *See Celotex v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995). Relevant to the present action, "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

The nonmoving party must go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. The Court must view all of the

facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citations omitted); *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1280 (8th Cir. 1996); *Marts v. Xerox, Inc.*, 77 F.3d 1109, 1112 (8th Cir. 1996). While the quantum of proof that must be produced to avoid summary judgment is not precisely measurable, it must be enough evidence for a reasonable jury to return a verdict in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

B. Compensation Sought

As relevant to this case, there are two types of charges which one carrier can extract from another for the provision of telecommunication services. The first deals with local telephone service and is referred to as reciprocal compensation. "'[R]eciprocal compensation' means that when a customer of one [LEC] calls a customer of a different [LEC] who is within the same local calling area, the first carrier pays the second carrier for completing, or 'terminating,' the call." *Pac. Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1119-20 (9th Cir. 2003). As stated by the Eighth Circuit, "[u]nder the 1996 Act, the amount an ILEC can charge for allowing a competitor to use its infrastructure to deliver a local call is to be determined by an interconnection agreement negotiated (or imposed by arbitration) between the ILEC and the interconnecting carrier that has been approved by the state commission." *INS v. Qwest II*, 363 F.3d at 686 (citing 47 U.S.C. §§ 251(c)(1);252(e)).

The second type of charge at issue is an "access" fee charged by common carriers for use in carrying long-distance telecommunications via their infrastructure, otherwise referred to as toll services. *See id.* (citing 47 U.S.C. §§ 201 (requiring common carriers engaged in interstate communication to furnish communication service upon request, to establish physical connections with other carriers, and to establish through routes), and 202 (prohibiting discrimination related to the use of common carrier lines of communication)). These charges are set by the common carriers in tariffs filed with either the FCC or the appropriate state commission. *See* 47 U.S.C. § 203(a).

In the present action, INS asserts it is owed payment of access charges pursuant to the tariffs it has filed with the FCC and the IUB. Meanwhile, Qwest asserts the appropriate compensation mechanism under the 1996 Act and the FCC's pre-1996 Act decisions is reciprocal compensation in negotiated (or arbitrated) interconnection agreements, not access charges via tariffs, and that Qwest is not required to pay such compensation pursuant to the decisions of the IUB.

C. The Parties and the Traffic at Issue

1. Type of Traffic

a. "Local" versus "Long Distance" Traffic

In its *Local Competition Order*, the FCC had to determine which telecommunications are subject to "reciprocal compensation" for "transport and termination" under section 251(b)(5). In so doing, the FCC distinguished between transport and termination of "local" calls, and that for "long-distance" calls, the latter having been historically subject to access charges. *Local Competition Order*, at ¶ 1033. For

purposes of regulation, a call is treated as "local" if it originated and terminates in the same local calling area; a call is treated as "long distance" if it terminates in a local calling area different than the one in which it originates.[24] *See Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1072 n.3 (8th Cir. 1997) ("*CompTel*").

The FCC concluded that "section 251(b)(5) reciprocal compensation," and not "access charges," would apply "to traffic that originates and terminates within a local calling area, as defined" in a subsequent paragraph. *Local Competition Order*, at ¶ 1034. In defining the local service area for calls to or from a CMRS network for purposes of applying sections 251 and 252, the FCC determined that the MTA serves as the most appropriate definition for local service area for CMRS traffic. *Id.* at ¶ 1036. "Accordingly, traffic to or form a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than

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[24] Long distance service is provided to the subscribers of "interexchange" (i.e., "long distance") carriers often referred to as "IXCs". For the origination and termination of long distance calls placed by their subscribers, IXCs use the LECs' local networks for which the IXCs pay "access charges." *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 520, 542 n.9 (8th Cir. 1998). IXCs recover the costs they incur, including originating and terminating access charges payable to LECs, in the rates they charge their end-user customers. *Id.*; *see also Local Competition Order*, at ¶1034 (noting that "in the access charge regime, the long distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service").

interstate and intrastate access charges." *Id.*[25] In contrast, "traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges" payable by the long distance carriers using the LECs' networks to provide the "end to end" service that they "sell as [their] product to [their] customers." *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d at 542 n.9.[26]

To summarize, the FCC's *Local Competition Order* provides that "traffic to and from a CMRS network that originates and terminates with the same MTA" is "local" traffic, and not long distance traffic subject to access charges. Qwest argues that this is so regardless of whether one or more intermediate or transiting carriers provide a portion of the transport of the call from the network of the CMRS provider to the network of the terminating LEC. According to Qwest, under the FCC decisions, the relevant facts are the geographic

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[25] These rulings were subsequently codified in FCC regulations at 47 C.F.R. § 51.701.

[26] The Eighth Circuit has affirmed the FCC's determinations to require LECs to charge rates for the use of their networks to transport and terminate "local" calls that differ from the rates they are permitted to charge for the transport and termination of "long distance" calls. *CompTel*, 117 F.3d at 1073. This case also affirmed that IXC's must pay access to LECs for terminating their calls. *Id.*

In reaching this decision, the court held the duty to interconnect is limited to an obligation to provide physical interconnection. *Id.* This means that ILECs do not have to provide transmission and routing services. *Id.*; *see also AT&T Corp. v. FCC*, 354 U.S. App. D.C. 325, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (relying on *CompTel* and concluding that the requirement for physical connection does not also require the exchange of traffic).

locations of the end-user customers placing and receiving the calls, not the method of interconnection chosen by the originating and terminating carriers.

In its decision, the Board explained that this determination means Qwest is not acting as an IXC providing long distance service to end users when the calling and called parties are located in the same MTA and the caller is served by a third-party CMRS provider. *IUB Proposed Decision*, at 13. Instead, Qwest is "providing an indirect connection for *local* traffic." *Id.* (emphasis added). Based on this determination, the IUB held that Qwest "has no obligation to pay access or other termination fees." *Order Affirming Proposed Decision*, at 2.

Qwest asserts that all federal courts to consider this issue have ruled, like the Board, that indirect connection through a transiting carrier does not convert intraMTA "local" calls into "long distance" calls for which the transiting or any other carrier must pay "access" charges to the terminating carrier.[27]

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[27] Qwest notes the decisions of the state commission and state courts of Missouri which approve the use of tariffs in lieu of interconnection agreements to establish compensation for the termination of intraMTA wireless traffic. *See In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*, 2001 Mo. PSC LEXIS 760, Case No. TT-2201-139, at *20 (Mo. PSC 2001) (citing *In the Matter of Alma Telephone Co.*, Case No. TT-999-428 (Mo. PSC 2000)). Qwest asserts, however, that these decisions *reject* the argument that use of a transit carrier converts what would otherwise be a local call into a long distance call, thereby allowing the terminating carrier to seek access charges or other compensation from the transiting carrier as opposed to the originating carrier, *see id.*, and thus do not contradict the decisions cited by Qwest.

For example, in 3 *Rivers Telephone Cooperative, Inc. v. U.S. West Communications, Inc.*, the court reasoned that the FCC's *Local Competition Order* "makes no distinction between such traffic [i.e., traffic delivered over a direct connection] and traffic that flows between a CMRS provider and LEC in the same MTA that also happens to transit another carrier's facilities prior to termination." *3 Rivers Tel. Coop., Inc. v. U.S. West Communs., Inc.*, 2003 U.S. Dist. LEXIS 24871, at *67 (D. Mt. 2003), *accord. Union Tel. Co. v. Qwest Corp.*, slip op., No. 02-CV-209B, at 26. 34 (D. Wyo. May 11, 2004); *see also Atlas Tel. Co. v. Corp. Comm'n of Okla.*, 309 F. Supp. 2d 1299, 1310 (W. D. Okla. 2004) (finding, consistent with the determination of the Oklahoma Commission decision being reviewed, that the FCC's classification of "mobile intraMTA traffic" as "local" as opposed to "toll" (i.e., interexchange or long distance) traffic applies "without regard to whether those calls are delivered via an intermediate carrier").[28] Accordingly, the *3 Rivers* court held that "Qwest is not liable to plaintiffs for terminating access charges on CMRS (wireless) traffic that

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[28] In a related case, Qwest draws the Court's attention to a recent decision from the U.S. District Court for the District of Nebraska where the court held, like the courts in *3 Rivers* and *Union*, that under the FCC's decisions, originating carriers must pay compensation to terminating carriers under the reciprocal compensation provisions of the 1996 Act "whether or not the call was delivered via an intermediate carrier." *WWC License, L.L.C. v. Boyle*, 2005 U.S. Dist. LEXIS 17201, slip op., Docket No. 4:03CV3393, at *6 (D. Neb. Jan. 20, 2005).

both originates and terminates in the same MTA."[29] *Id.* at *68-69.

Qwest further asserts that the FCC's own decisions foreclose any doubt that indirect interconnection does not convert intraMTA (i.e., "local") calls into "long distance" calls or otherwise justify the imposition of a compensation obligation for such calls on a transiting carrier. Qwest points out that in Paragraph 1039 of the *Local Competition Order* the FCC acknowledges the existence of indirect interconnection between originating and termination carriers through "facilities provided by alternative carriers," but nowhere held such an arrangement converted a "local" call into a "long distance" call or allowed other carriers to impose a compensation obligation on the transiting carrier. *See Local Competition Order*, at ¶ 1039. Additionally, in its *Intercarrier Compensation NPRM*, the FCC confirmed that use of a transit carrier for intraMTA calls is a form of "local" connection. NPRM, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, at ¶ 91 (2001) ("*Intercarrier Compensation NPRM*").

In addition, Qwest argues that the FCC held specifically that the "cost causation principles" underlying its intercarrier compensation rules "allocate" the cost of delivering traffic to the carriers responsible for the traffic and, ultimately, their customers. *Texcom Inc. v. Bell Atlantic Corp.*, 16 FCC Rcd. 21493, at ¶ 6 (2001) ("*Texcom Order*"); *see also Texcom Inc.*

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[29] The *3 Rivers* court also rejected the argument that paragraph 1043 of the *Local Competition Order* "carved out an exception that preserves the access charge system for wireless calls that were subject to access charges prior to the 1996 Act." *3 Rivers Tel. Coop., Inc.*, 2003 U.S. Dist. LEXIS 24871 at *67; *see also IUB Proposed Decision*, at 12-13 (rejecting same argument).

v. Bell Atlantic Corp., 17 FCC Rcd. 6275, at ¶ 4 (2002) ("*Texcom Reconsideration Order*") (citing 47 U.S.C. § 251(b)(5), and 47 C.F.R. § 51.702). Thus, where a transiting carrier is involved, the originating third-party carrier pays for the cost of delivering their calls to the transiting carrier, while the terminating carrier pays for the cost of transporting that traffic from the transiting carrier's network to its network. *Texcom Order*, at ¶ 6; *Texcom Reconsideration Order*, at ¶ 4. The terminating carrier may then "seek reimbursement of these costs from originating carriers through reciprocal compensation." *Texcom Reconsideration Order*, at ¶ 4 (citing 47 U.S.C. § 251(b)(5), and 47 C.F.R. § 51.702). Thus, transiting carriers bear no responsibility for compensating other carriers, for they lack relationships with either the calling or called parties. Qwest asserts that this scheme is particularly manageable and sensible here because of the affiliation between INS and the terminating ILECs, and because, as the Board explained, "connecting the independent LECs to other telecommunications carriers in an efficient manner is the very reason for INS's existence." *IUB Order Denying Application for Rehearing*, at 12.[30]

Finally, Qwest contends that the FCC's Common Carrier Bureau, acting on behalf of the FCC in place of a state commission, has stated that federal law does not require a transiting carrier over its objection to compensate another

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[30] Qwest asserts the Board's determination that INS should seek compensation from the originating CMRS providers is also consistent with the "cost causation" principles relied upon by the FCC. In any event, Qwest asserts the Court need not decide which carrier, originating or terminating, is responsible for compensating a transiting carrier; rather, all that matters here is that the obligation is not that of another transiting carrier.

carrier for its transport and termination of calls originated by third-party carriers under the theory that the calls are the transiting carrier's "own traffic", *see Petition of WorldCom Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, Memorandum Opinion and Order*, 17 FCC Rcd. 27039, at ¶ 541 (2002) ("*Verizon Virginia Order*"); *see also id.* at ¶¶ 114, 119, and that there is no evidence in the Board's record that Qwest refused to provide to terminating LECs information received by Qwest from the originating CMRS providers. *See Petition of Cavalier Telephone LLC Pursuant to ¶ 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Commission Regarding Interconnection Disputes with Verizon, Virginia, Inc., and for Arbitration, 18 FCC Rcd. 25887, at ¶ 42 (FCC Wireline Competition Bureau 2003) ("Cavalier"). Based on these decisions*, Qwest argues that transiting carriers have no compensation obligations with respect to the transport and termination of intraMTA wireless or other local calls originated by end-user customers of third-party carriers under the Act.

INS, on the other hand, argues that Qwest improperly relies on the "local" terminology to support its argument that intermediary carriers are barred from collecting access charges for transiting intraMTA traffic. INS contends the FCC has abandoned the "local" terminology as it is "not accurate to simply describe intraMTA calls (which can cover very long distances) as local."[31] *See Intercarrier*

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[31] According to INS, the FCC now orders carriers to use the term "section 251(b)(5) traffic" in lieu of the term "local traffic".

Compensation for ISP-Bound Traffic, Implementation of the Local Competition Provisions of the Telecommunications Provisions in the Telecommunications Act of 1996, 16 FCC Rcd. 9151, at ¶ 45 (2001) ("*ISP Remand Order*"), *remanded on other grounds*, 351 U.S. App. D.C. 176, 288 F.3d 429 (D.C. Cir. 2002)[32] (reasoning that eliminating the category of "local" traffic better reflects the role of section 251(g) in distinguishing between charges that are governed by reciprocal compensation rules and charges that are governed by the access rules).

Qwest counters that the Board considered and correctly rejected INS' contention that the FCC has abandoned the "local" terminology for purposes of intercarrier compensation in general and wireless traffic in particular, and thereby confirmed CMRS-originated traffic that had previously been subject to terminating access charges was unaffected by the 1996 Act and the *Local Competition Order*. *IUB Order Affirming Proposed Decision*, at 5-6. As the Board explained, the FCC "clearly states" in the *ISP Remand Order* that the ISP data traffic analysis "does not apply to CMRS traffic." *Id.* (citing *ISP Remand Order*, at ¶ 47 ("[T]he analysis we

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See Verizon Virginia Order, at ¶ 315. Changes removing all references to "local" in the reciprocal compensation rules were published at 66 Fed. Reg. 26806 (May 15, 2001) and incorporated into the Code of Federal Regulations. *See, e.g.*, 47 C.F.R. § 51.701; *see also* 61 Fed. Reg. 45632 (Aug. 29, 1996); *Level 3 Communs., LLC v. Public Utilities Comm'n of Colo.*, 300 F. Supp. 2d 1069, 1076 (D. Colo. 2003) (finding the new version of rules governs).

[32] The *ISP Remand Order* remains in effect. *Verizon Md., Inc. v. Global Naps*, 377 F.3d 355, 2004 U.S. App. LEXIS 15849, at * 31 (4th Cir., 2004).

adopt in this *Order*, that section 251(g) limits the scope of section 251(b)(5), does not affect the application of the latter section to LEC-CMRS interconnection."). Indeed, Qwest argues that the INS' argument is further refuted by the fact that, on the very same day it issued the *ISP Remand Order*, the FCC also released its *Intercarrier Compensation NPRM*, which reiterated that access charges do not apply to "the transport and termination of local traffic." *Intercarrier Compensation NPRM*, at ¶ 6.

The Court finds the Board's determinations that the traffic at issue here is "local" traffic and not long distance is supported by the 1996 Act and FCC decisions implementing and explaining the Act. The Board interpreted the FCC's definition of "local" traffic to include all traffic that both originates and terminates within the same MTA, which is the type of traffic in dispute. The Board concluded that this definition holds regardless of whether transiting carriers are involved in the transportation of the call from the originating customer to the end user being called. The Court finds these determinations are wholly reasonable and in accordance with the current state of the law governing telecommunications.

In other words, the IUB did not violate federal law in rendering decision within its jurisdiction that the traffic from third-party CMRS providers that Qwest carries (as a transiting carrier) and transports to INS' network is "local" traffic under the 1996 Act and as defined by the FCC in its *Local Competition Order*. As will become apparent, the Court's conclusion on this matter contributes greatly to the resolution of a myriad of issues argued in this complex case.

b. IntraMTA Versus InterMTA and Wireless Versus Wireline

INS contends that Qwest, as the summary judgment proponent, has not carried its burden of proof in establishing that its nonpayment is for intraMTA calls. INS acknowledges that there are intraMTA wireless-originated calls at issue in this case, but the relative proportion of those calls compared to other calls delivered by Qwest for which Qwest has not paid is unknown. Indeed, INS asserts Qwest has provided no evidence or records to support its contention that all of the wireless calls involved in this case are intraMTA calls. INS asserts this question of material fact precludes grant of summary judgment as the success of Qwest's entire argument is premised on all of the calls being intraMTA.

While INS is seeking compensation from Qwest for each of the calls that Qwest delivered to INS for completion, the proportion of the unpaid calls that are wireless-originated as opposed to originating on the Qwest network or that of another landline carrier is not established on the record before the Court. According to INS, Qwest simply assumes without evidence that all the calls for which it did not pay are wireless-originated. In fact, INS points out that in a case pending in the U.S. District Court for the Northern District of Iowa, Qwest has recently alleged that some of the calls it delivered to INS, which forwarded the calls to an independent LEC, were in fact originated by landline long distance carriers. *See* Order, *Northwest Iowa Tel. Co. v. Qwest*, Case No. 04-4053 (Dec. 17, 2004). As in that case, INS asserts discovery is needed to determine the true nature of the calls at issue.

The Court finds the exact nature of each of the calls at issue is not dispositive of Qwest's motion for summary

judgment. While a factual dispute is apparent, this does not generate a *material* issue of fact if the law requires INS to proceed through the process of negotiation and arbitration, rather than pursuant to tariffs or equitable remedies, before a legally supportable claim may be advanced in this Court.

2. Regulatory Classification of Parties

a. INS

INS has claimed before the Board, this Court, and the Eighth Circuit that it is not an ILEC, and that, as a result, the Section 251(c)(1) duty to negotiate and the Section 252 negotiation/arbitration process do not apply to it. INS then contends that consequently, the Board's decision that it should seek compensation in the negotiations between the originating CMRS providers and the terminating ILECs is unlawful. Qwest argues that INS is mistaken, as its regulatory classification is not relevant to the lawfulness of the decisions in the Board's proceeding.

The Court finds the regulatory classification of INS is not pertinent given this Court's essential determination of the validity of the IUB decision. In other words, the Court finds it need not resolve whether INS is acting as an LEC with respect to the traffic at issue. As the Court concludes above, the Board determined the traffic at issue is local and strongly suggested the parties, including INS, engage in negotiations to resolve the disputes concerning the traffic at issue. As a result of this ruling, INS' regulatory classification becomes irrelevant for purposes of engaging in negotiations pursuant to the Board's lawful orders.

b. Qwest

The regulatory classification of Qwest is, however, pertinent as there exists within the reciprocal compensation rules an exception for IXCs.[33] Thus, to determine whether Qwest is liable for access charges under the IXC exception to the intraMTA rules, it is necessary to decide whether Qwest is acting as an "incumbent LEC" or as an "interexchange carrier" in the circumstances giving rise to this action. INS points out that the Eighth Circuit held in its order remanding this case that Qwest is *not* acting as an incumbent LEC with respect to the calls at issue. *INS v. Qwest II*, 363 F.3d at 693 n.3. Instead, INS posits Qwest is acting as an IXC.

It is undisputed that the calls at issue travel state-wide and so cross the boundaries of local exchanges, meaning they are interexchange. *INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at *1-3. Further, INS asserts Qwest acted in a manner indistinguishable from any other IXC purchasing access service in the following manner: (1) Qwest's facilities are landline as opposed to wireless, (2) Qwest delivered written "Access Service Requests" to INS to establish the trunks designated for interchange carriers over which Qwest delivers the calls at issue, (3) those trunks are the same trunks used to carry ordinary wireline-to-wireline ling distance calls, (4) those trunks are the same trunks for which Qwest has paid access charges to INS in the past, and (5) Qwest makes no effort to distinguish or separate intraMTA wireless-originated calls from other long distance traffic. Indeed, Qwest paid for these calls pursuant to access tariffs for many years. *See INS v. Qwest II*, 363 F.3d at 684;

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[33] *See* discussion *supra*, at Section D.4.

see also CompTel, 117 F.3d at 1072 (recognizing that IXCs are the purchasers of access service).

The IUB recognized the IXC exception but construed it as being limited to IXCs that directly serve the end-user customers, thereby excluding IXCs hired by other carriers. The Board then determined Qwest is not acting as an IXC providing long distance service to end users with whom it has a billing relationship, *Proposed Decision and Order*, at 13, but is providing an indirect connection for calls placed by end-user customers of other carriers. Consequently, the Board held that "Qwest has no obligation" to pay INS and its ILEC owners "access" charges or other fees for the transport and termination of such calls. *IUB Order Affirming Proposed Decision*, at 2.

INS asserts the IUB misconstrued federal law on this issue. INS contends that, constructively, the IUB read the term "IXC" as limited to IXCs acting in a retail capacity. According to INS, the plain definition of "IXC" under federal law is not limited to retail IXCs, but includes IXCs providing service to other carriers. *See AT&T Corp. v. Excel Communications Mktg., Inc.*, 172 F.3d 1352, 1353 (Fed. Cir. 1999) (describing provision of service by "facilities-based IXCs to other carriers); *Southwestern Bell Tel Co. v. FCC*, 325 U.S. App. D.C. 249, 116 F.3d 593, 595 (D.C. Cir. 1997) (same); *Bell-Atlantic Delaware, Inc. v. Frontier Communications, Inc.*, 16 FCC Rcd. 8112, ¶ 3 (2001); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd. 18025, 18026, ¶¶ 34, 44, 45, 48, 50, 70, and n. 223 (1997) ("*Application of World Com*") (discussing in detail how IXCs provide both wholesale and retail long distance service). Thus, INS asserts that both retail and wholesale IXCs purchase access service. *See Southwestern Bell Tel. Co. v. FCC*, 116 F.3d at 595. INS

argues that providing capacity that other carriers may use in routing a call, as Qwest does in the present case in carrying calls from the CMRS providers networks to the INS network, is a basic, wholesale long distance function, *see Application of WorldCom*, at ¶ 50; *AT&T Corp. v. American Cash Card Corp.*, 184 F.R.D. 515, 518 (S.D.N.Y. 1999), and that the *3 Rivers* court, on remand from the Ninth Circuit, rejected Qwest's arguments that liability for access charges was limited to situations in which Qwest was acting in a retail capacity. *3 Rivers Tel. Coop.*, 2003 U.S. Dist. LEXIS 24871, at *44.

INS further asserts that nothing in the *Local Competition Order* alters the normal definition of IXC as to limit the term to IXC acting in a retail capacity and excluding IXCs hired by other carriers. To the contrary, INS argues that limiting the IXC exception to retail IXCs would effectively eviscerate the exception because retail IXCs are rarely if ever involved in carrying wireless-originated calls. The FCC acknowledged contemporaneously with issuing its *Local Competition Order* that Congress, in another provision of the Telecommunications Act of 1996, exempted wireless carriers from the duty imposed on landline LECs to allow their end users to select a retail IXC of their choice. *See In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Service*, 11 FCC Rcd. 12456, at ¶ 3 (1996) (recognizing that because of Section 332(c)(8), CMRS carriers are not required to let the consumer choose a long distance carrier); *see also* 47 U.S.C. § 332(c)(8). Thus, according to INS, given this freedom, wireless carriers that desire assistance in carrying calls route them to wholesale IXCs, thereby keeping control of the relationship with the end user.

Moreover, INS asserts that, because of the issue in the present case, it makes far more sense to evaluate whether Qwest acted as IXC based on its relationship with INS than on the fortuity of whether an end user or another carrier hired Qwest. INS points out that Qwest submitted "Access Service Requests" to INS, sent traffic over long distance access trunks used by other IXCs, and paid for these calls for years pursuant to access service tariffs. According to INS, the practical impact of Qwest's involvement, i.e., it prevents INS from directly measuring the traffic from each wireless carrier, is the same regardless of who hired Qwest. *See Nat'l Indus. Constructors, Inc. v. Occupational Safety & Health Rev. Bd.*, 583 F.2d 1048, 1055 (8th Cir. 1978) (finding "regulations should be given a reasonable, common sense interpretation" whenever possible).

Finally, INS urges the Court to keep in mind the fundamental purpose of Section 251 in general, and the reciprocal compensation rules in particular, is to promote competition for local telephone service. *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 944 (8th Cir. 1999) (noting 1996 Act is intended to "jump-start" local competition). The FCC's reciprocal compensation rules apply to "competing" local service providers.[34] *Local*

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[34] The reciprocal compensation rules apply when "competitors are required to use the incumbent LECs' existing networks to terminate calls to incumbent LEC customers", when "terminating traffic destined for competing Carriers' subscribers", and "when transporting and terminating a call that originated on a competing carrier's network." *Local Competition Order*, at ¶¶ 1058, 1090. The only known exception where reciprocal compensation applies to calls between noncompetitors is the so-called "neighboring ILEC" exception, where the custom prior to the 1996 Act (where neighboring ILECS exchanged calls free of access charges pursuant

Competition Order, at ¶ 1087. According to INS, the purpose of promoting local competition is advanced when a wireless carrier builds facilities in order to enter the market in an area served by a rural ILEC and can use the MTA rule to establish a larger area than the ILEC's smaller traditional calling area in which calls may be exchanged free of access charges.

INS argues that here Qwest proposes to set aside the IXC exception and apply the MTA rule even where there is no local competition between the wireless carriers and the rural ILEC. INS avers that this interpretation would eliminate access charges to rural ILECs for out of state wireless carriers (but still located in the Des Moines MTA) or carriers serving primarily in urbanized areas as long as these carriers routed the calls through Qwest. Indeed, INS notes Qwest has offered no evidence that any substantial portion of the calls at issue involve competing wireless carriers and rural ILECs.

Thus, according to INS, Qwest is a landline provider hired to carry calls from a customer of one local service provider (the wireless carrier) to a customer of another local service provider (the rural ILEC) without regard to whether the local service providers are competing. INS argues this is consistent with the classic IXC function for which IXCs pay access charges, *see United Tel. Assoc. v. FCC*, 338 U.S. App. D.C. 1, 188 F.3d 521, 523 (D.C. Cir. 1999), which is not a local competition function to be governed by the reciprocal compensation rules. In short, INS contends Qwest acted as an IXC in delivering the calls to INS (or at the very least, INS has raised genuine issues of material fact as to whether Qwest was acting as an IXC), and the IXC exception

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to the extended area service ("EAS")) was carried forward. *See* 47 C.F.R. § 51.711(a)(2).

supports the application of access charges to the intraMTA intrastate wireless-originated calls involved in this case.

Qwest urges the Court to find the Board properly rejected the arguments of INS and its ILEC owners that the FCC's statements in paragraph 1034 of the *Local Competition Order* about the imposition of access charges on IXCs apply to indirect interconnection by Qwest for intraMTA calls originated by third-party CMRS providers. According to Qwest, the Board correctly construed paragraph 1043 to refer to "long distance traffic delivered to the LEC by a classic IXC, such as AT&T, which has a billing relationship with the customer who initiates the call." *IUB Proposed Decision*, at 13. Conversely, the Board held "the FCC's analysis is not applicable to a carrier in the position that Qwest occupies in this case, where it has no end-user customer in the transaction who can be billed for the costs Qwest incurs to complete these calls." *Id.*

The Board explained additionally that paragraph 1043 refers to payment or nonpayment of access charges "by CMRS providers," not to "intermediate carriers like Qwest," and that such "traffic . . . is not Qwest's toll traffic." *Id.* According to Qwest, this is a reference to the fact that access charges are payable by the carrier whose network originates the call, and only on toll, i.e., long distance, traffic.

Qwest next argues the fact that some IXCs pay access charges not only for long distance calls placed by their end-user customers but also for such calls placed by end-user customers of third-party carriers that "resell" the IXC's services does not undermine the Board's analysis, as INS contends, for two reasons. First, in the resale scenario, the IXC is selling an "end-to-end" service that includes the access service provided by the originating an terminating LECs. The

rates charged to the reseller by the IXC thus cover the access charges paid by the IXC to the LECs and are not passed through to the end-user customers of the IXC. According to Qwest, the record before the Board establishes Qwest did not sell the CMRS providers an end-to-end or other service that included transport by INS and termination by INS' ILEC owners and that Qwest's rates to the CMRS providers (about 1/4 cpm) did not cover the rates that INS (about 1.14 cpm) and its ILEC owners (an average of about 9.2 cpm) seek from Qwest. Second, Qwest points out that the services and calls at issue in the cases cited by INS were long distance, not local.

Finally, Qwest argues there is no merit to INS' arguments that, with respect to the traffic at issue, "Qwest acts in a manner that is indistinguishable from any other IXC purchasing access service." Qwest asserts the fact that its facilities are landline as opposed to wireless and that the calls at issue cross exchange boundaries is irrelevant;[35] rather, it is relevant that the calls are originated over the networks of CMRS providers by their end users and the fact that the local

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[35] Even if it were relevant, Qwest contends it did not transport the calls at issue over an exchange boundary. Qwest explains that the distance between its switch and INS' switch is a mere six blocks, and that undisputed fact underscores that Qwest is not providing a "long distance" service but rather is simply providing an indirect method of interconnection between the originating CMRS providers and INS and its ILEC owners.

INS argues that it makes no difference whether Qwest transports a call six blocks or 600 miles, as it is the beginning and end points of a call that determines whether the call is long distance. *See* 47 U.S.C. § 153(48). According to INS, Qwest acts as an IXC with regard to the intraMTA traffic because the beginning and end points of the call lie in different exchanges.

calling area is defined in terms of an MTA, not an exchange. Likewise irrelevant, according to Qwest, is the fact it delivers local and long distance over the same trunk group as no FCC or Board decision holds the classification of a call depends on the trunk group over which it is delivered. Finally, Qwest maintains equally irrelevant is the fact that it had in the past submitted "ASRs" and paid "access charges" to INS in light of changes in the law effected in the *Local Competition Order*,[36] and the resultant cessation of ordering access service for the calls at issue by Qwest in April 1999. *See IUB Proposed Decision*, at 37-38.

Further, Qwest states it is worth noting that in both *Texcom* and the *Intercarrier Compensation NPRM*, the FCC referred to the transiting carrier as a LEC or ILEC, not as an IXC. *Texcom Order*, at ¶¶ 2, 5, 10; *Intercarrier Compensation NPRM*, at ¶ 91 n.148. Qwest contends the point here is not that Qwest, the transiting carrier in *Texcom*, or the hypothetical transiting carrier in the *Intercarrier Compensation NPRM* were acting as LECs or ILECs for the calls at issue; rather, the point is that they were not acting as IXCs. According to Qwest, transiting carriers in these circumstances are acting neither as IXCs nor LECs.

In summary, in the Board's proceeding, the IUB determined Qwest does not, pursuant to its transiting agreements with the wireless carriers, provide "long distance" or any other service to the end-user customers of those carriers, and Qwest has no billing relationship with those

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[36] Qwest further asserts the FCC and Bureau decisions subsequent to the *Local Competition Order* confirm the lack of relevance to the circumstances upon which INS relies in arguing Qwest is acting as an IXC.

customers. *See IUB Proposed Decision*, at 13. According to Qwest, its customers are the wireless carriers, which purchase a transit service wherein Qwest provides an indirect connection to INS. Moreover, the calls at issue begin and end in the same MTA and are therefore local. Additionally, Qwest contends it does not provide an "and-to-end" service that includes origination and termination of the calls at issue, a fact that distinguishes Qwest's activity from those carries offering long distance resale services.

INS responds that Qwest's argument that is not an IXC by distinguishing its service from that provided by an IXC reseller providing end-to-end service is flawed. According to INS, it makes no difference if Qwest's rates do not cover INS' access charges as the geographic rules promulgated by the FCC will result in the rates charged by IXCs not covering their access charges in some areas. *See, e.g.*, 47 C.F.R. § 64.1801[37] (providing that the rates charged by IXCs to subscribers in rural and high cost areas be no higher than the rates charged to its subscribers in urban areas, and as applied on a state-by-state basis). Thus, INS argues whether or not Qwest's rates cover access charges is not dispositive of whether Qwest is an IXC, though it does raise questions not appropriate for decision on summary judgment.

Moreover, INS asserts Qwest is an IXC because of the arrangements that it has made with CMRS carriers for Qwest to provide long distance service to the end users of those carriers. As noted, CMRS providers are not required to permit end users to select the long distance provider for their choice, *see* 47 U.S.C. § 332(c)(8), and Qwest has entered into contractual arrangements with CMRS providers to be the long

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[37] Promulgated pursuant to 47 U.S.C. § 254(g).

distance provider for those carriers' end users (thereby becoming the long distance company for those end users). INS asserts that Qwest then assesses a separate "toll", i.e., "long distance", charge to the wireless carriers to carry calls between exchanges, and that charge is passed on to the end users.

While these complex arguments seem more focused upon what the law should be, or may become through this gradual evolution, the Court is obliged to make a determination of the current state of the law and the power and authority still in the IUB. At bottom, the Court finds the reasoning and results reached by the IUB to be compelling on this issue. The Court finds the Board's determination that Qwest is not acting as an IXC with respect to the traffic at issue is consistent with federal law. The interpretation of the Board of the definition of IXC, and specifically that an IXC must have a billing relationship with the end-user customer, is compatible with FCC determinations, and INS has pointed to no authority finding otherwise. Accordingly, the Court recognizes and accepts the Board's finding that Qwest is not an IXC in the instant case.

D. Reciprocal Compensation and Access Charges

INS states that Qwest's primary argument is that the FCC's reciprocal compensation rules (specifically the MTA rule) became the exclusive source of compensation for every carrier involved in every aspect of every intraMTA wireless-originated call, to the exclusion of access charges. INS contends Qwest erred in its description and interpretation of the reciprocal compensation rules, which, according to INS' reasoning, do not apply in the present case. Qwest counters that the Board correctly determined the reciprocal compensation rules are applicable, and that under these rules,

Qwest is under no obligation to compensate INS for its transit service (with this obligation belonging to the third-party CMRS providers originating the calls at issue).

1. Access Charges and Tariffs

Prior to the 1996 Act, the FCC issued several decisions related to interconnection between wireless carriers and wireline local telephone companies (i.e., LECs) pursuant to section 201 of the Communications Act of 1934, 47 U.S.C. § 201. Specifically, the FCC held "the cellular carrier should be permitted to choose the type of interconnection", *Policy Statement, The Need to Promote Competition and Efficient Use of the Spectrum for Radio Common Carrier Services*, 59 RR2d 1275, Appendix B, at ¶ 3 (1986) ("*Efficient Use Policy Statement*"); *see also Implementation of Sections 3(N) and 332 of the Communications Act*, 9 FCC Rcd. 1411, at ¶ 230 (1994) (hereinafter "*Section 332 Implementation Order*") (finding it "in the public interest to require LECs to provide the type of inter connection reasonably requested by all CMRS providers"), though the wireline carrier was obligated only to provide "a form of interconnection no less favorable than that furnished to the wireline carrier." *NECA Exchange No. 9: Radio Common Carrier Services* 4 (National Exchange Carrier Ass'n, Inc. 1992). The FCC also adopted the principle of "mutual compensation", meaning that wireless carriers and LECs were required to compensate one another for the transport and termination of calls originating on each other's networks. *Section 332 Implementation Order*, at ¶¶ 229-31, 233; *see also Declaratory Ruling, Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd. 2910, at ¶¶ 4, 6, 8, 12, 17, 21 (1987) (hereinafter "*Efficient Use of Spectrum*").

In addition, the FCC required that the rates, terms, and conditions applicable to the exchange of traffic between end-user customers of wireless carriers and LECs be established through interconnection agreements, *Efficient Use of Spectrum*, at ¶¶ 54-56; *Order on Reconsideration. Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 4 FCC Rcd. 2369, at ¶¶ 10, 13-14 (1989) (hereinafter "*Order on Reconsideration*"), "if the non-wireline carrier chooses to negotiate such with the telephone company." *NECA Exchange No. 9: Radio Common Carrier Services* 4. The FCC stated that tariffs should be filed "only after the co-carriers have negotiated agreements on interconnection." *Efficient Use of the Spectrum*, at ¶ 56; *Order on Reconsideration*, 4 FCC Rcd. 2369 at ¶¶ 13-14. The FCC instructed carriers to file complaints, not tariffs, if they were unable to negotiate agreements without regulatory intervention. *Efficient Use of Spectrum*, at ¶ 56; *Order on Reconsideration*, 4 FCC Rcd. 2369 at ¶ 15.

Based on concerns about interference with its authority to regulate interconnection for the purpose of interstate traffic, in 1987 the FCC preempted state regulations of intrastate interconnection that are inconsistent with its "mutual compensation" and "negotiated agreement" requirements. *Efficient Use of Spectrum*, at ¶ 21. With these exceptions, the FCC has refused to preempt state regulations addressed to interconnection between wireless carriers and LECs, reasoning that because wireless carriers are

> primarily engaged in the provision of "local, intrastate, exchange telephone service, the compensation arrangements among [wireless] carriers and local telephone companies are largely a matter of state, not federal concern." The [FCC] further

> determined that these arrangements are "properly the subject of negotiations between the carriers as well as state regulatory jurisdiction."

NPRM. *Equal Access and Interconnection Obligations Pertaiing to Commercial Mobile Radio Services*, 9 FCC Rcd. 5408, at ¶ 108 (1994) ("*Equal Access NPRM*") (quoting *Efficient Use Policy Statement*, at 1284-85).

In 1993, Congress amended the 1934 Act as part of the Omnibus Reconciliation Act ("the Budget Act"), Pub. L. No. 103-66,107 Stat. 312 § 6002 (1993), by adding 47 U.S.C. § 332(c)(1)(B), which requires the FCC, upon the reasonable request of a CMRS provider, to order a common carrier to provide interconnection in accordance with the procedures specified in section 201 of the 1934 Act. *See* 47 U.S.C. § 332(c)(1)(B). The Budget Act preempted state regulation of market entry and rates charged by wireless carriers but otherwise expressly preserved state jurisdiction over intrastate wireless carriers, services, and tariffs. *See* 47 U.S.C. § 332(c)(3).

In 1994, the FCC adopted an order implementing section 332 and holding that section 332 did not "limit or expand the [FCC's] authority to order interconnection pursuant to the [1934] Act." *Section 332 Implementation Order*, at ¶ 220. The FCC reiterated its prior requirement that carriers enter into interconnection agreements providing for mutual compensation. *Id.* at ¶¶ 229, 232. The FCC also required LECs to "establish reasonable charges for interstate interconnection provided to [CMRS] licensees." *Id.* at ¶ 233. Again, the FCC refused "to preempt state regulation of LEC intrastate interconnection rates." *Id.* at ¶ 231.

Qwest argues that it has *no obligation* to pay INS "access" charges or other compensation for intraMTA calls originated by customers of third-party CMRS providers. Qwest characterizes the thrust of INS' claims before the Board and this Court is that Qwest is acting as an interexchange, i.e., long distance, carrier providing inter-exchange service, and that INS may therefore collect from Qwest tariffed "access" charges applicable to such carriers and service. *See* INS Complaint, ¶ 19 (Qwest's 'transit' service is an interexchange service); *IUB Proposed Decision*, at 13 (describing INS' argument). In particular, INS contends that the FCC's ruling that intraMTA wireless calls are "local" applies only where the originating CMRS provider and the terminating LEC are "directly" connected. *IUB Proposed Decision*, at 11 (describing INS' argument).

As delineated above, the Board found access charges inapplicable to the traffic at issue based on its prior determination that said traffic was "local." As a result, the Board ruled Qwest was not liable for access charges after it gave notice to INS that it was no longer paying such charges in April 1999. The Court finds the Board's determination that Qwest is not required to pay access charges, and that access charges are not even available, is entirely consistent with federal law. Since the traffic at issue is classified as "local", access charges are no longer available under the 1996 Act and the FCC's interpretive and implementing decisions.

2. Applicability of Reciprocal Compensation Rules

In finding access charges are no longer available for the type of traffic in dispute here, i.e., "local" traffic, the Court assesses whether the Board erred in determining reciprocal compensation did apply. The first key issue is to whom do the reciprocal compensation rules apply. INS asserts it is the two

carriers at each end of the call, i.e., the originating carrier and the terminating carrier, whose rates are governed by the reciprocal compensation rules. INS then asserts that charges of intermediary carriers such as INS are not governed by the reciprocal compensation rules or any other rules adopted pursuant to the 1996 Act, and the ability to collect access charges is therefore not displaced.

a. Transiting Carriers

INS bases its contentions that the reciprocal compensation rules do not apply to transiting carriers on the *Local Competition Order*, which defines reciprocal compensation arrangements as involving "two carriers" who charge each other to terminate calls originated by the other. *Local Competition Order*, at ¶ 1034. Specifically, the rule adopted in the *Local Competition Order* states as follows:

> a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receive compensation from the other for the transportation and termination on each carrier's network of telecommunications traffic that originates on the facilities of the other carrier.

47 C.F.R. § 51.701 (e). Under the rules, the originating carrier pays the terminating carrier. The originating carrier is the carrier that provides local telephone service (by radio or wire) to the calling party, while the terminating carrier is the carrier that provides local telephone service to the called party. *Local Competition Order*, at ¶ 1034; *Texcom Reconsideration Order*, at ¶ 4.

According to INS, the FCC has applied Rule 51.701(e) several times since 1996, holding each time that compensation

to intermediary (also known as "transiting" carriers) is *not* governed by the reciprocal compensation rules. *See, e.g., Texcom Reconsideration Order*, at ¶ 4 (refusing to apply the reciprocal compensation rules to limit charges of a transiting carrier, explaining "our reciprocal compensation rules do not provide for such compensation to a transiting carrier. Our rules provide a mechanism for the terminating carrier. . . to recover from originating carriers"); *Mountain Communications, Inc. v. Qwest Communications Int'l, Inc.*, Order on Review, 17 FCC Rcd. 15135, at ¶ 3 (2002) ("*Mountain Communications*") (finding the transiting carrier, "*because* it is not a terminating carrier, could not recover reciprocal compensation payments for transiting traffic").[38]

INS asserts the FCC's decision to limit the reciprocal compensation rules to the carriers which originate and terminate the calls makes sense for both textual and competition policy reasons. From a textual perspective, Rule 51.701(e) is one of at least nine references in the reciprocal compensation rules to those rules governing "two carriers" or "both carriers", *see* 47 C.F.R. §§ 51.701(c) and (e), 51.705(b), 51.709(b), 51.711(a)(2) and (b), 51.713(a), thus excluding additional carriers that are added as

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[38] Another aspect of the *Mountain Communications* decision (concerning wide area calling) was vacated by the D.C. Circuit on appeal. In the oral argument on the transiting charges, the transiting carrier (Qwest) agreed to provide billing information to the terminating carrier so the terminating carrier could bill the originating carrier, thereby prompting the terminating carrier which had been billed charges for transiting services to withdraw its appeal as to the transiting issue. *See Mt. Communs., Inc. v. FCC*, 355 F.3d 644, 649, 359 U.S. App. D.C. 349 (D.C. Cir. 2004).

intermediaries.[39] Even the definition of a a reciprocal relationship is one involving two parties. *Blacks Law Dictionary*, 6th ed. 1990 ("Reciprocal -- Given or owed mutually as between two persons; interchanged. Reciprocal obligations are those due from one person to another and vice versa"); *see also* 47 U.S.C. § 251(b) (referring to "reciprocal" compensation).

From a policy perspective, INS states that, as this Court noted in an earlier ruling in this case, the Telecommunications Act of 1996 "was intended to jump-start competition in the market for local telephone service." *INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at *4-5; *see also Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d at 944. It is the originating and terminating companies that are providing local phone service and own the cell towers, local phone switches, telephone poles, and wire necessary to provide such service. There is no way to reach the end user except through his or her chosen local telephone

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[39] INS asserts in a footnote that based on the references to two carriers, "the FCC went too far and departed from its own rules in *Texcom* and *Mountain Communications* in applying the reciprocal compensation rules at all to multi-carrier arrangements." INS contends that the reference to "the interconnection point between the two carriers," 47 C.F.R. § 51.701(c), must mean "directly between," and that the FCC itself contrasted two-carrier reciprocal compensation arrangements with multi-carrier arrangements involving access charges. *Local Competition Order*, at ¶ 1034. INS does state, however, that because it is an intermediary carrier and the rural ILECs who are terminating carriers are not parties to this lawsuit, the Court will likely not need to reach this issue. INS does state though that this is an additional reason supporting INS' right to enforce its tariffs.

company be it wireless or landline.[40] *See In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd. 9923, at ¶ 30 (2001) (finding that once an end user selects a local telephone company, any carrier trying to get a call through to that end user must deal with the local telephone company, which controls the "bottleneck" to that end user). By contrast, transiting carriers are in the business of carrying large quantities of calls between telephone switches owned by the originating and terminating carriers. INS asserts that because they are not providing the local telephone service, have no control over the end-user customer, and are hired when their services are economical and convenient, different regulations are called for.

Subsequent FCC decisions considered the rights and obligations of transiting carriers under the 1996 Act and the *Local Competition Order*. In discussing "types of local LEC-CMRS interconnection" in an NPRM on intercarrier compensation, the FCC explained that "in rural settings, wireless carriers can elect to deliver CMRS-originated calls to a large ILEC for routing to the rural LEC carrier." *Intercarrier Compensation NPRM*, at ¶ 91.

In a separate case, the FCC provided the following in determining the application of its transport and termination rules to transiting:

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[40] *See Local Competition Order*, at ¶ 1013 (finding that wireless carriers provide "telephone exchange service", a/k/a/local telephone service, although by statute they are excluded from the definition of local exchange carrier).

> Currently, our rules in this area follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic, and ultimately their customers. Thus, through reciprocal compensation payments, the cost of delivering LEC-originated traffic is borne by the persons responsible for those calls, the LEC's customers. As we stated in the Local Competition Order, "[t]he local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call." . . . In the case of third-party originated traffic, however, the only relationship between the LEC's customers and the call is the fact that the call traverses the LEC's network on its way to the terminating carrier. Where the LEC's customers do not generate the traffic at issue, those customers should not bear the cost of delivering that traffic from a CLEC's network to that of a CMRS carrier like Answer Indiana. Thus, the originating third-party carrier's customers pay for the cost of delivering their calls to the LEC, while the terminating CMRS carrier's customers pay for the cost of transporting that traffic from the LEC's network to their network.

Texcom Order, at ¶ 6; *see also Texcom Reconsideration Order*, at ¶ 4.[41]

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[41] In the *Texcom* case, at issue were intraMTA calls that originated on the networks of third-party carriers, transited the network of Defendant GTE North ("GTE"), and terminated on the network of Complainant Answer Indiana, a CMRS provider. *Texcom Order*, at ¶ 1. Answer Indiana's formal complaint to the FCC alleged that GTE's attempts to recover from it costs incurred to deliver the calls were unlawful. *Id.* at ¶ 3. The FCC denied Answer Indiana's complaint. *Id.* at ¶ 6.

On reconsideration of this decision, the FCC reiterated that a transiting carrier "may charge a terminating carrier for the portion of facilities used to deliver transiting traffic to the terminating carrier ... and [the terminating carrier] may seek reimbursement of these costs form originating carriers through reciprocal compensation." *Texcom Reconsideration Order*, at ¶ 4 (citing 47 U.S.C. § 251(b)(5), 47 C.F.R. § 51.702). The FCC also noted that "carriers are free to negotiate different arrangements for the costs associated with indirect interconnection." *Id.* (citing 47 U.S.C. § 252(a)(1)).

The FCC's Common Carrier Bureau ('the Bureau") also considered "the appropriate compensation mechanism for calls that originate on the network of a third-party LEC and terminate to an AT&T customer" during an arbitration of interconnection agreements done by the Bureau in lieu of the Virginia commission.[42] *Verizon Virginia Order*, at ¶ 541. AT&T, the terminating carrier, proposed that Verizon, as the transiting carrier, treat all calls as Verizon's own and compensate AT&T accordingly. *Id.* The Bureau rejected this proposal, finding that "when a third-party LEC places a call that terminates to [an AT&T customer], AT&T must bill the third-party LEC directly" when traffic originated by third-party carriers "transits the network of an incumbent or other carrier, such as Verizon." *Id.* at ¶ 544 and n. 1807 (citing the *Texcom* decisions).

In another section 252(e)(5) arbitration, the Bureau held the transiting carrier was not responsible for paying

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[42] The state commission for Virginia had declined to conduct the arbitration. *Verizon Virginia Order*, at ¶ 1. In that circumstance, the 1996 Act requires the FCC to conduct the arbitration. *See* 47 U.S.C. § 252(e)(5).

compensation to the terminating carrier except as to calls for which the former failed to provide the latter call identification information passed by the originating carrier. *See Cavalier*, at ¶¶ 40-42. The Bureau did hold, however, that the transiting carrier was not required to alter its systems to develop information that was not transmitted to it by the originating carrier. *Id.* at ¶ 42.

INS asserts the FCC has acknowledged the right of the transiting carrier to charge for its services outside the reciprocal compensation system, *see Texcom Reconsideration Order*, at ¶ 4; *Mountain Communications*, at ¶ 2, though at issue is which rules govern. INS asserts the FCC has also responded to this issue by observing it has not adopted any specific rules governing transiting carrier charges, and that therefore transiting carriers have flexibility on structuring their charges. *Verizon Virginia Order*, at ¶ 115 ("Given the absence of Commission rules specifically governing transit service rates, we decline to find that Verizon's additional charges are unreasonable.").

INS argues that the lack of restrictions alone defeats Qwest's arguments that INS is charging in violation of FCC rules. Due to the lack of any regulatory barrier, INS urges the Court to simply enforce the tariffs accepted by the regulator.

In addition, INS contends that the FCC's failure to adopt new rules governing the charges of transiting carriers validates INS' charges in an additional manner. In 1996, Congress provided for the continuation of pre-existing charging systems until "explicitly superceded" by subsequent FCC action. 47 U.S.C. § 251(g); *CompTel*, 117 F.3d at 1072. As of the enactment of the 1996 Act, and for three years thereafter, Qwest was paying INS for the traffic at issue, pursuant to INS access tariffs, and had been doing so

since the 1980s. *INS v. Qwest II*, 363 F.3d at 687. While Section 251(g) explicitly carries forward pre-existing rules only as to interstate services, INS asserts the FCC concluded Congress intended to carry forward pre-existing rules for intrastate services as well in any situation in which interstate rules are carried forward. *See ISP Remand Order*, at ¶ 37 n.66.[43] INS argues that as a consequence of the carry forward

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[43] *ISP Remand Order*, 17 FCC Red. 9151 n.43 In the ISP Remand Order, the FCC explained that Congress must have intended to exclude from Section 251(b)(5) reciprocal compensation any intrastate traffic that would be explicitly excluded under Section 251(g) if it were interstate. The FCC reasoned that it would be "incongruous" to have the reciprocal compensation rules cause more of a "disruption" at the intrastate level, where the FCC has historically had less authority, than at the interstate level:

> Although section 251(g) does not itself compel [carrying forward pre-existing access charge regimes] with respect to intrastate access regimes (because it expressly preserves only the *Commission's* traditional policies and authority over interstate access services), it nevertheless highlights an ambiguity in the scope of "telecommunications" subject to section 251(b)(5) -- demonstrating that this term must be construed in light of other provisions in the statute. In this regard, we again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system but had no such concerns about the effects of analogous intrastate mechanisms.

ISP Remand Order, 17 FCC Red. 9151, at ¶ 37, n.66 (internal quotations and citations omitted). Also, in the *ISP Remand Order*, the FCC cited its previous ruling in the *Local Competition Order*

rule and the FCC's determination it extends to intrastate traffic, Qwest's obligation to pay the charges set forth in INS' access tariffs remain in place, and the obligation only ceases when the FCC supercedes that duty or Qwest ceases using INS' services, neither of which have occurred.

INS points out that Qwest successfully advocated this conclusion in the *Mountain Communications* case, *see* Brief to the FCC, *Mountain Communications*, at 5 and n.11 ("The Commission's reciprocal compensation rules specifically address a two-carrier scenario. . . . Transit charges, like many other lawful charges authorized by state law, were left intact by the Act."), and that the IUB agreed INS could charge for transiting services, but mistakenly concluded that the reciprocal compensation rules changed the terms under which INS could impose those charges. *In re Exchange of Transit Traffic, Order Affirming Proposed Decision and Order*, Docket SPU-00-7, at 2 (Iowa Utils. Bd. March 18, 2002) ("*Order Affirming Proposed Decision*").

Qwest counters INS' claim that the Board's determination runs counter to the FCC's refusal to adopt specific rules governing transiting carrier charges is foreclosed by numerous FCC decisions. Specifically, Qwest asserts that the FCC's decisions hold uniformly that transiting carriers are not required to pay compensation to other carriers for their

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that the carry-forward concept in Section 251(g) should apply to intrastate as well as interstate traffic. *Id.* (citing *Local Competition Order*, at ¶ 732 (relying on the Commission's powers under Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), to make all orders necessary and proper in carrying out its functions and 47 U.S.C. § 251(d)(1))).

handling of intraMTA calls placed by customers of other carriers.

Moreover, Qwest asserts INS misreads the FCC decisions it relies on, as the results in those disputes would have been much different if INS' position were correct. *See, e.g., Texcom Inc. v. Bell Atlantic Corp.*, 16 FCC Rcd. 21493 (2001) and *Texcom Inc. v. Bell Atlantic Corp.*, 17 FCC Rcd. 6275 (2002) (collectively "*Texcom*") (terminating carrier Answer Indiana compensated the transiting carrier GTE rather than transiting carrier paying access charges or other compensation to the terminating carrier); *Mountain Communications, Inc. v. Qwest Communications Int'l, Inc.*, 17 FCC Rcd. 2091, at ¶¶ 8-10 (FCC Common Carrier Bureau) ("*Mountain Bureau Order*") and *Mountain Communications*, at ¶¶ 2-3, *aff'd in part and rev'd in part on other grounds*, 359 U.S. App. D.C. 349, 355 F.3d 644, 649 (D.C. Cir. 2004) (terminating carrier compensated the transiting carrier Qwest rather than transiting carrier paying access charges or other compensation to the terminating carrier);[44] *Verizon Virginia Order*, at ¶¶ 114, 119, 541 (originating or terminating carriers, AT&T and MCI, compensated the transiting carrier Verizon and established its own billing arrangements rather than transiting carrier paying access charges or other compensation to the terminating carrier); *Intercarrier Compensation NPRM*, at ¶ 91 n. 148[45]

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[44] INS observes that "Qwest agreed at oral argument" before the D.C. Circuit "to provide to the terminating carrier billing information so that the terminating carrier could bill the originat[ing] carrier." Qwest asserts that the evidence indicates that Qwest has at all times offered to provide such evidence to INS.

[45] According to Qwest, the passages of the *Intercarrier Compensation NPRM* cited and discussed reflect the FCC's

(identifying transiting carrier as ILEC rather than IXC and declaring lawful the refusal of the transiting carrier to bill the originating CMRS provider on behalf of the rural LEC).

Qwest notes that INS does not dispute that the FCC and its Wireline Competition Bureau have held or recognized that transiting carriers have no federal law obligation to pay access charges or other compensation to other carriers for their handling of intraMTA calls placed by end-user customers of third-party CMRS providers. Instead, Qwest contends INS engages in a collateral attack of the FCC decisions by claiming the FCC "went too far and departed from its own rules in *Texcom* and *Mountain Communications*" on the applicability of "reciprocal compensation" to "multicarrier arrangements." Qwest argues that even assuming *arguendo* that such a collateral attack were permissible,[46] the rationale

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understanding of current law as the FCC has yet to adopt new or different rules in its docket.

[46] Under the Hobbs Act, 28 U.S.C. § 2342, jurisdiction to review decisions of the FCC is exclusive in the Courts of Appeal. *See, e.g., U.S. West Communs., Inc. v. Hamilton*, 224 F.3d 1049, 1054-55 (9th Cir. 2000), *amended by*, 2000 U.S. App. LEXIS 26417 (9th Cir. Oct. 23, 2000); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 398-400 (9th Cir. 1996); *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 120 (7th Cir. 1982). Statutory provisions such as the Hobbs Act that vest exclusive jurisdiction in the appellate courts to review agency orders bar collateral attacks by nonparties as well as parties to the agency proceeding. *See City of Peoria*, 690 F.2d at 120 (explaining that nonparty may set up a challenge by initiating a proceeding before the agency). "A challenge to an [agency] order need not be direct" to invoke these statutory provisions; "all that is required is that the effect of the prayed for relief contradict a Commission order." *Victor Oolitic Stone Co. v. CSX Transp., Inc.*, 852 F. Supp. 721, 723 (S.D. Ind.

1994). Further, the Hobbs Act bars collateral attacks to FCC decisions in either rulemakings, adjudications, or proceedings for declaratory relief. *See, e.g., Wilson*, 87 F.3d at 398.

Qwest notes that even if the Hobbs Act did not bar INS' collateral attack on the transiting decisions of the FCC and the Bureau, those decisions would nevertheless be entitled to substantial deference. *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 386-87 (7th Cir. 2004) (recognizing that Bureau decision in *Verizon Virginia Order* "require deference as the voice of the FCC interpreting its own rules") (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)); *MCImetro Access Transmission Servs., Inc. v. BellSourth Telecomm., Inc.*, 352 F.3d 872, 880 n.8 (4th Cir. 2003) (rejecting argument that Bureau decision in *Verizon Virginia Order* "should not be given the deference we normally give decisions by the FCC").

Meanwhile, INS argues that its arguments do not constitute a collateral attack and that it does not seek to overturn prior FCC decisions. The point of INS' discussion was not that those decisions should be invalidated, as those decisions actually confirm INS' assertion that the FCC has not applied reciprocal compensation rules to the charges of transiting carriers. To the contrary, INS claims its comment was merely made to highlight that it seemed incongruous that the FCC would apply its reciprocal compensation rules to the originating and terminating carriers in a multicarrier situation when reciprocal compensation generally does not apply in such situations.

According to INS, while the FCC's rules provide that "a reciprocal compensation arrangement *between two carriers* is one in which each of the *two carriers* receives compensation from the other carrier," and there is an "interconnection *between the two carriers*," 47 C.F.R. § 51.701(c) and (e) (emphasis added), the fact remains that the FCC has acknowledged the right of transiting

in the FCC's transiting decisions does *not* contradict the results in those decisions and does not support INS' Complaint against Qwest.

In particular, Qwest asserts the FCC's decisions that transiting carriers may seek compensation from terminating carriers is entirely consistent with the "cost causation" principles that underlie the FCC's current intercarrier compensation rules. *Texcom Order*, at ¶ 6. Correspondingly, Qwest argues it is entirely inconsistent with the inter-carrier compensation rules, with the underlying cost causation principles, to impose a compensation obligation on a transiting carrier as INS seeks to do here. *Compare Texcom Order*, at ¶ 6 ("Where the ILECs [i.e., the transiting carrier] customers do not generate the traffic at issue, those customers should not bear the cost of delivering that traffic . . . ."), *with IUB Proposed Decision*, at 13 (finding INS' argument that Qwest is the carrier required by the *Local Competition Order* to compensate INS "is not applicable to a carrier in the position that Qwest occupies in this case, where is has no end-user customer in the transaction who can be billed for the costs Qwest incurs to complete these calls").[47]

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carriers to charge for its services outside the reciprocal compensation system. *See* discussion *infra*, at Analysis Section E.2. In the instant case, INS contends such charges are in the form of access charges as set forth in its federal tariff. Further, INS reiterates its contentions that even terminating carriers are not governed by the reciprocal compensation rules where the IXC exception applies. *See* discussion *infra*, at Analysis Section D.4.

[47] Qwest further argues that the FCC's statement in *Texcom* that its reciprocal compensation rules do not authorize recovery by the transiting carrier from the originating carrier provides no support for a claim against another transiting carrier, as opposed to the

Qwest also contends that the IUB correctly interpreted the Act and the FCC decisions applying the Act and counters that INS' proposed interpretation would result in massive increases in costs incurred by CMRS providers and the resulting increased cost to providers. Specifically, Qwest contends that if INS' argument were correct, CMRS providers would either need to build up their network infrastructure in order to interconnect directly with many terminating ILECs[48] or interconnect indirectly with and pay to the terminating LECs non-cost based access charges averaging about 9.2 cents per minute ("cpm"). In contrast, Qwest asserts cost-based reciprocal compensation would average approximately 1 cpm. Qwest maintains that the resulting costs, many of which would be passed to consumers, is the very result the FCC sought to avoid in the *Local Competition Order* and is contrary to the policy driving the 1996 Act, i.e., fostering competition in the local and wireless markets. While these factually based issues cannot be resolved in the current posture of the case, the argument illustrates the essential thrust of the emerging law in this area.

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terminating carrier. Additionally, the FCC has expressly acknowledged that carriers involved in the handling of the call are free to work out different compensation arrangements. *Texcom Reconsideration Order*, at ¶ 4 n. 12. Qwest argues that in the present case, the CMRS carriers that originated the calls at issue do not object to entering into interconnection agreements pursuant to which they compensate transiting carriers, as confirmed by their payments to Qwest of such compensation for the use of Qwest's network, the absence in the record before the Board of any objection by them to such arrangements, and the fact they did not appeal the Board's decision.

[48] Including more than one hundred terminating ILECs in Iowa alone.

Even if the FCC had not determined which carrier in multicarrier arrangements is obligated to compensate transiting carriers, that would not mean the Board's determination that Qwest has no obligation to compensate INS for the calls at issue violates federal law. The FCC has itself held that where it has not clearly resolved a section 251 issue underlying a "carrier-to-carrier dispute", the state commission is authorized to resolve it subject to federal court review to ensure the chosen resolution is not inconsistent with federal law. Memorandum Opinion and Order, *Application of Qwest Communications International, Inc. For Authorization to Provide In Region, InterLATA Service in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd. 26303, at ¶ 325 (2002) ("*Qwest Application*"). As discussed *supra*, Qwest argues the Board's resolution of the dispute between Qwest and INS, which results from the decision of the CMRS carriers to exercise their rights under 47 U.S.C. § 251(a) to interconnect "indirectly" with the terminating LECs, is in no way inconsistent with federal law.[49] Qwest asserts the Board's authority to resolve these disputes is even clearer here as the

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[49] Contrary to INS' assertion, Qwest contends the Bureau did not state or imply in the *Verizon Virginia Order* that because the FCC had not adopted any "specific rules governing transiting carrier rates," *Verizon Virginia Order*, at ¶ 115, that such carriers therefore have flexibility to unilaterally impose a compensation obligation on another carrier that neither originated or terminated the call. In fact, Qwest points out that the Bureau held that a transiting carrier had no such compensation obligation, and the statement relied on by INS concerned the level of "rates" that could be assessed by the transiting carrier on the originating or terminating carrier. *Id.*

traffic at issue is exclusively intrastate and local.[50] *INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at *7 (recognizing "the IUB has jurisdiction over telecommunications services provided inside the state of Iowa, as long as the Board does not act in a manner inconsistent with the Act or FCC regulations") (citing 47 U.S.C. §§ 253(b), 261); *see also* 47 U.S.C. §§ 251(d)(3), 252(e)(3).

While INS acknowledges the FCC decision in the *Verizon Virginia Order* that a transiting carrier is not required to compensate a terminating carrier, INS points out that it is a transiting carrier, not a terminating carrier, and therefore the *Verizon Virginia Order* has dubious applicability to the situation here. In addition, INS contends Qwest overlooks a subsequent decision by the same FCC Common Carrier Bureau[51] in which the Bureau distinguished this earlier decision and ordered a transiting carrier to pay access charges to a terminating carrier where the transiting carrier failed to pass on available information that would allow the terminating carrier to bill the originating carriers. *Cavalier*, at ¶ 40 and n.148.

In *Cavalier*, the Bureau required the transiting carrier to pass on to the terminating carrier all information it has regarding the originating carriers. *Id.* As long as the transiting carrier fulfilled its obligation to pass on available billing information, the terminating carrier was to bill the originating carriers at reciprocal compensation rates. *Id.* at ¶ 42-43.

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[50] Qwest asserts the "relatively insubstantial" amount of interstate, intraMTA traffic terminated by INS' ILEC owners is likewise subject to the Board's jurisdiction. *See Local Competition Order*, at ¶ 1038.

[51] Since renamed the Wireline Competition Bureau.

Failure to pass on the information would, however, result in the transiting carrier being charged higher access rates for the termination of the unidentified traffic. *Id.* INS contends the Bureau's *Cavalier* decision confirms a key point in INS' arguments, that is, the reciprocal compensation rules may (absent the IXC exception) govern the charges imposed by the *terminating carrier* on the *originating wireless carrier* for an intraMTA call, but they do not govern charges imposed on or by *transiting carriers* such as Qwest and INS.

INS also asserts the result in *Cavalier* and the earlier decisions in *Texcom* and *Mountain Communications* underscore the fallacy in Qwest's argument that the FCC has adopted rigid rules governing the rights and duties of transiting carriers. INS contends these decisions demonstrate the flexibility and absence of restrictive rules and, as indicated by the decisions, transiting carriers are permitted to charge the originating carrier, the terminating carriers, can sometimes be charged by the terminating carrier, and generally operate in an environment in which general rules have not been set. *See Mountain Communications*, 17 FCC Rcd. 15135, at ¶ 2; *Verizon Virginia Order*, at ¶¶ 115-17; *Cavalier*, at ¶ 43. INS asserts its tariff is therefore permissible as discussed in more detail *infra*.

INS asserts that the Communications Act provision that governs the interconnection obligations of INS as an ordinary nonincumbent LEC confirms this flexibility as it provides INS "has the duty . . . to interconnect directly *or* indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1) (emphasis added). The FCC has explained that the disjunctive in this section gives the carrier providing interconnection the choice to interconnect directly or indirectly, and that it can make the decision "based upon [its] most efficient technical and economic choices."

Local Competition Order, at ¶ 997. INS asserts commingling of traffic is an example of a technical and efficiency consideration that supports a decision to hold the directly connecting carrier, in this case Qwest, responsible for payment.

Qwest counters INS' assertions with regard to the *Cavalier* decision by claiming there is no merit to INS' contention that its approach is fundamentally the same as that taken by the FCC in *Cavalier*. To the contrary, Qwest asserts the Bureau's approach is more akin to that taken by the Board in this case.

Qwest first points out that *Cavalier* involved arbitration of an interconnection agreement following the failure of the parties negotiations. *Cavalier*, at ¶ 1. The existing dispute concerned the obligations of the transiting carrier to provide information to facilitate billing of the third-party originating carriers where local and long distance calls are delivered over the same trunk group. *Id.* Qwest asserts this is precisely the issue here, and that the Board appropriately suggested negotiation, with arbitration an option if those negotiations failed, much like what occurred in *Cavalier*. *See IUB Proposed Decision*, at 30 and n.5.[52]

Qwest further disputes INS' contention that the decision *of the CMRS providers* to interconnect indirectly with INS somehow allows INS to collect from *Qwest* access charges or other compensation. Qwest argues that contrary to INS' claim, the *Local Competition Order* does not grant INS the right to unilaterally decide the type of interconnection with CMRS providers, and that in any case, "indirect

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[52] Qwest contends the Board grounded its decision on both 47 U.S.C. § 252 and state law. *IUB Proposed Decision*, at 30 n.5.

interconnection (*e.g.*, two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunication carrier's duty to interconnect pursuant to section 251(a)." *See Local Competition Order*, at ¶ 997;[53] *see also Efficient Use Policy Statement*, at ¶ 3 (noting that the FCC had agreed that "cellular carriers should be permitted to choose the type of interconnection); *Section 332 Implementation Order*, at ¶ 230 (finding it "in the public interest to require LECs to provide the type of interconnection reasonably requested by all CMRS providers).

b. Intermediary Carriers and the Further NPRM

On March 3, 2005, the FCC released its *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 F.C.C.R. 4685, CC Docket No. 01-92, FCC 05-33 (Mar. 3, 2005) ("Further NPRM"). In this notice of proposed rulemaking, the FCC discusses intermediary carriers and the reciprocal compensation rules, and while such a notice is a proposal to adopt a rule of prospective applicability rather than a binding order, the FCC's discussion is still pertinent.[54]

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[53] In fact, the thrust of the *Local Competition Order* in general, and the sections on LEC-CMRS interconnection in particular, was to protect or expand the rights of CMRS providers in their dealings with incumbent LECs and other carriers with "market power." *See, e.g.*, *Local Competition Order*, at ¶ 997. Thus, Qwest asserts that a rule permitting wireline carriers to dictate the type of interconnection with CMRS providers would have been a radical departure from prior law that the FCC would have acknowledged.

[54] The rulemaking proceeding is on a slow track that commenced in 2001 and has just now reached the stage of publishing a menu of alternative proposals for new rules (but not

In the *Further NPRM*, the FCC observes that it has not adopted rules governing the charges of intermediary, i.e., transiting carriers. The FCC states the following:

> The reciprocal compensation provisions of the Act address the exchange of traffic between an originating carrier and a terminating carrier, but the Commission's reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider.

Further NPRM, at ¶ 120. The FCC states further,

> If rules regarding transit service are warranted, we seek comment on the scope of such regulation. Specifically, we seek comment on whether transit service obligations under the Act should extend solely to the incumbent LECs or to all transit service providers, including competitive LECs.

Further NPRM, at ¶ 130. And additionally,

> [W]e seek further comment on the appropriate pricing methodology, including the possibility of requiring that transit service be offered at the same rates, terms,

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yet specific rule text) and seeking comment on them from the industry and other affected parties. Given the lengthy comment period (running 90 days following publication in the Federal Register), the time required to analyze the voluminous comments likely to be received, and the overall slow pace of this rulemaking proceeding, the Court should not anticipate that a decision will be issued until sometime in 2006, at the earliest. Even then the results of that decision would only affect calls carried after the new rules, if any, are adopted and go into effect.

> and conditions as the incumbent LEC offers for equivalent exchange access services (*e.g.*, tandem switching and tandem switched transport) and how this option would be affected by our proposals to alter the current switched access regime.

Further NPRM, at ¶ 132. INS asserts this discussion confirms there is no existing rule regulating intermediary carrier (transiting) charges, such as those that INS' federal tariff requires Qwest to pay.

INS argues that the *Further NPRM* also confirms that the FCC has not resolved the separate issue of whether a terminating local carrier should charge access charges or reciprocal compensation when it terminates intraMTA wireless-originated calls that transit the netwrok of a Bell Company such as Qwest. *See Further NPRM*, at ¶ 137 ("We also note that carriers have disagreed regarding the meaning of the existing intraMTA rule. Many rural LECs argue that intraMTA traffic between a rural LEC and a CMRS provider must be routed through an IXC and therefore is subject to access charges, rather than reciprocal compensation. CMRS providers, however, argue that all CMRS traffic that originates and terminates within a single MTA is subject to reciprocal compensation. In the event that we retain the rule and interpret its scope in the more limited fashion advocated by the rural LECs, should the rule be changed so that all intraMTA traffic to or from a CMRS provider is subject to reciprocal compensation?") (footnotes omitted); *id.* at ¶ 137 n.392 (describing the rural LEC position that the transit carrier acts as an interexchange carrier (IXC) in the case of traffic "to or from" a wireless carrier).

Qwest, on the other hand, contends the *Further NPRM* provides no support for INS' claims. Qwest points out that the

Further NPRM states only that the FCC has "not adopted rules" governing the charges of transiting carriers, and "not resolved" other issues. Qwest asserts that what INS continues to miss is that the Iowa Utilities Board *has* resolved these issues in Iowa, consistent with the Board's role under the 1996 Act and the FCC's pre-Act decisions. Qwest contends that the Board's decisions are thus substantive law that must be applied to the merits of the partis' dispute, unelss INS is able to show the Board's decision *violates* federal law.[55]

Qwest further argues that the theory underlying INS' Complaint, i.e., that in the absence of FCC rulings it may resolve unilaterally disputes regarding rates, terms, and conditions for its transport of intraMTA calls, is simply false. Qwest reiterates that FCC decisions have consistently held that disputes within a state regarding the rates, terms, and conditions applicable to LEC-CMRS interconnection (including the transport and termination of intrastate wireless calls) are to be resolved by the state commission, except to the extent the state's decisions conflict with FCC regulations.[56] *See* Declaratory Ruling, *Efficient Use of Spectrum*, at ¶¶ 54-56 (holding intercarrier compensation arrangements for wireless traffic are to be established in interconnection agreements between the parties); *Equal Access NPRM*, at ¶ 108 (finding wireless interconnection arrangements are "largely a matter of state, not federal concern"); *Section 332 Implementation Order*, at ¶ 231 (holding the rates for the intrastate component of wireless

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[55] Qwest notes that it is not arguing here for application of the principle of either claim or issue preclusion; rather, the Court should consider and reject in the merits any claim by INS that the Board's decision violates federal law.

[56] *See* discussion *supra*, at section D. 1.

interconnection agreements is entirely a matter of state concern).

Qwest further underscores its argument by pointing out that in the 1996 Act, Congress expressly authorized state commissions to prescribe regulations to fulfill the requirements of that section of the Act encompassing Sections 251 through 261, *see* 47 U.S.C. § 261(b), and the FCC has held LEC-CMRS interconnection issues are to be addressed under sections 251 and 252. *Local Competition Order*, at ¶¶ 1023, 1025. Thereafter, the FCC held that where it has not clearly resolved a section 251 issue, the state commission is authorized to resolve it subject to federal court review, *Qwest Application*, at ¶ 325, and the Eighth Circuit has confirmed federal law does not preempt state regulation absent an express declaration to that effect by the FCC. *See Qwest v. Scott*, 380 F.3d 367 (8th Cir. 2004). Qwest argues that, *a fortiori*, where the FCC has expressly declined to preempt state regulation of intrastate communications, state commissions retain jurisdiction.

This continuing rulemaking, while not precedent, is a convincing demonstration that the issues now presented are unresolved in the law. Against that backdrop, the essential issue becomes whether the IUB has power and authority to resolve the pending questions, which this Court finds it does, and then whether that resolution conflicts with federal law.

Qwest emphatically argues that ultimately INS' failure to show the Board's resolution of the parties' dispute violates federal law is fatal to its Complaint. Qwest asserts no FCC decision or statement, including the *Further NPRM*, requires a state commission to accept a tariff, or defer to an unauthorized federal tariff filed unilaterally for the purpose of

preempting state commission jurisdiction over intrastate traffic.

To the contrary, Qwest points out that the FCC prefers negotiated agreements, as recently reaffirmed in a recent order. *See* Declaratory Ruling Report and Order, *Developing a Unified Intercarrier Compensation Regime. T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, 20 F.C.C.R. 4855, CC Docket No. 01-92, FCC 05-42, at ¶ 14 (FCC Feb. 24, 2005) ("*T-Mobile Wireless Termination Order*"). Qwest also argues that equally important is the acknowledgment in the *Further NPRM* that compensation for the termination of intraMTA is a matter for the originating and terminating carriers, not the transiting carrier. *Further NPRM*, at ¶ 133. Indeed, in a prior NPRM, the FCC emphasized that its "[e]xisting access charge rules and the majority of existing reciprocal compensation agreements require the calling party's carrier, whether LEC, IXC or CMRS, to compensate the called party's carrier for terminating the call." *Intercarrier Compensation NPRM*, at ¶ 9.

Finally, Qwest contends INS misconstrues the statements in the *Further NPRM* pertaining to the intraMTA rule. According to Qwest, the FCC appears to have been referring to circumstances where traffic originating or terminating outside a wireline LEC's local calling "*must* be routed through an IXC." *Further NPRM*, at ¶ 137 (emphasis added). Qwest asserts there is no contention before the Board that the CMRS carriers were required to route the intraMTA calls of their customers through Qwest, and more fundamentally, Qwest reasserts that it was not acting as an IXC serving the end-user customers placing or receiving the calls. In any event, Qwest contends the FCC's statements in its *Further NPRM* suggest some ambiguity in the intraMTA rule as

applied to calls for which the intermediate carrier is not acting as an IXC. Qwest asserts the rule is subject to interpretation by state commissions and the federal courts, and Qwest argues that all of those considering the issue have rejected the interpretation offered by INS.

The Court finds the Board did not err in its determination that the reciprocal compensation rules applied to INS and Qwest as related to the traffic at issue. Furthermore, the Court finds this holding is consistent with federal law. Even if that were not true, the Court reiterates that the IUB had the authority under the 1996 Act and administrative regulations to rule with respect to these issues. Given that authority, and the lack of an express declaration by the FCC resolving the issue, demonstrated by the *Further NPRM*, it was well within the Board's power to rule as it did. In other words, in addressing this unresolved area, the IUB could resolve the matter (at least in Iowa) by application of the reciprocal compensation rules. It is the duty of the IUB to resolve such issues within Iowa, and those determinations are binding unless and until the FCC expressly finds otherwise. Accordingly, the Court finds the Board's determination that the reciprocal compensation rules are applicable to the traffic at issue must control the current dispute.

3. Negotiation and Arbitration and Section 252 Exclusivity

The 1996 Act also establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between the competing carriers to implement its substantive

requirements.[57] Under the 1996 Act, "all local exchange carriers are required to establish reciprocal compensation arrangements in their interconnection agreements." *Id.* at 1119 (quotations and citations omitted). Negotiation is triggered by a carrier making a bona fide request ("BFR") to enter into an interconnection agreement for the exchange of local traffic.[58] 47 U.S.C. § 252(a)(1).

Once negotiations begin, both the ILEC and the other carrier "have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the Act's goals." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 792 (8th Cir. 1997) (citing 47 U.S.C. §§ 252(c)(1), 252(a)(1)). If the parties fail to reach an agreement through voluntary negotiations, either party may petition the relevant state public utility commission to arbitrate and resolve any open issue. 47 U.S.C. § 252(b). The final agreement, whether negotiated or arbitrated, must be approved by the state commission. *Id.* (citing 47 U.S.C. §§ 252(b), 252(e)(1)).

INS asserts that Qwest's contentions regarding the exclusivity of Section 252 is an attempt to persuade this Court to invalidate a tariff approved by the FCC. INS submits Qwest's exclusivity argument does not relate to the FCC's jurisdiction over intrastate wireless traffic, but rather to the proper procedural mechanism (tariff or contract) for setting the terms and conditions of services within that jurisdiction.

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[57] This system is similar in structure to that adopted by the FCC prior to passage of the 1996 Act.

[58] Though non-ILECs cannot be compelled to negotiate by delivering a BFR because they have no duty to exchange local traffic. *See* 47 U.S.C. § 252(a)(1); *but see* discussion *infra*, at footnote 58.

INS concedes that the FCC and courts have declined to rule on the exclusivity of Section 252. *See Global NAPs, Inc. v. FCC*, 345 U.S. App. D.C. 390, 247 F.3d 252, 260 (D.C. Cir. 2001). However, should the Court consider Qwest's Section 252 exclusivity argument, INS contends the argument fails substantively for four reasons.

First, INS argues that even if Section 252 has an implicit exclusivity provision, then such exclusivity could logically arise only where the Section 252 process is in fact available *and* where the carrier seeking to set its charges is within the class of carriers required to negotiate/arbitrate pursuant to § 252. INS asserts neither condition is met here as neither INS nor Qwest is an ILEC and so cannot be forced to participate in an interconnection negotiation/arbitration.[59] *See Petition for Declaratory Ruling by Alabama's Rural Incumbent Local Exchange Carriers . . . upholding the applicability of tariff provisions governing compensation for indirect CMRS traffic*, 2004 Ala. PUC LEXIS 27, 232 P.U.R. 4th 148, *47-53 (Ala. P.S.C. Jan. 26, 2004); *State ex rel. Sprint Spectrum L.P. v. Mo. Pub. Serv. Comm'n*, 112 S.W.3d 20, 24-26 (Mo. App. 2003) (affirming state commission).

Second, INS notes in another case involving wireless interconnection traffic, the D.C. Circuit rejected a similar Qwest argument that the Section 252 process is exclusive. *See Qwest Corp. v. FCC*, 346 U.S. App. D.C. 271, 252 F.3d 462, 465 (D.C. Cir. 2001). In that case, a wireless carrier field a Section 208 complaint with the FCC against Qwest to resolve a dispute involving reciprocal compensation rules. Without deciding whether Section 252 would provide the

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[59] *See* discussion *supra*, at section C.2.

exclusive means of resolving disputes, the D.C. Circuit held Section 332 provided an independent basis for FCC jurisdiction over all wireless interconnection traffic and thus Section 252 could not be the exclusive procedure to resolve disputes. According to INS, this case affirms use of procedures other than Section 252, such as the Section 204 tariff process invoked by INS here.

Third, INS asserts Section 251(g) preserves the right of intermediary carriers to impose charges as they did prior to the 1996 Act, and the *TSR Wireless Order* confirms that intraMTA wireless originated calls carried by IXCs are subject to access charges.[60] *See In re TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCC Rcd. 11166, at ¶ 31 (2000) ("*TSR Wireless Order*"). INS further asserts that even if reciprocal compensation rather than access charges govern, the INS federal tariffs is crafted as a reciprocal compensation tariff.

Fourth, INS asserts it is not required to show a specific FCC order or regulation authorizing it to file a tariff for wireless interconnection transiting traffic, as the Communications Act states without restriction that LECs "may" file tariffs setting "new or revised charge[s], classification[s], regulation[s], or practice[s]," and provides, without restriction, that such filing "shall become effective" if not suspended or rejected by the FCC within 15 days. 47 U.S.C. § 204(a)(3). Once a tariff is effective, it is deemed lawful, indicating no additional approval is needed. The FCC has adopted rules to ensure that the staff at the FCC are specifically notified of deemed lawful tariff filings under

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[60] These assertions are discussed more fully *infra*, at section D.4.

Section 204(a)(3), and so have the opportunity to review the filing before it becomes effective and subject only to prospective invalidation. 47 C.F.R. § 61.33(d); *see also ACS of Anchorage, Inc. v. FCC*, 351 U.S. App. D.C. 317, 290 F.3d 403, 411-13 (D.C. Cir. 2002) (reviewing differences between deemed lawful tariffs under § 204(a)(3) and other types of tariffs).

Qwest argues that INS is wrong in claiming that because Congress did not *require* in Section 252 entities other than ILECs to negotiate or arbitrate interconnection agreements, it follows the Board's determinations violate federal law. According to Qwest, INS' claim seeks, in substance, to apply the maxim "*expressio unius*" to construe the omission from Section 252 of a requirement that INS submit to a negotiation/arbitration process as a prohibition on that result. Federal courts have held, however, that this maxim "has little force in the administrate setting," *see Mobile Communications Corp. of America v. FCC*, 316 U.S. App. D.C. 220, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (citing *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 291 U.S. App. D.C. 254, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron v. NRDC*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984))), and Qwest asserts INS has identified no manner in which its participation in the negotiation/arbitration process would defeat the more market-oriented regime that Congress sought through the 1996 Act. In short, Qwest argues that the imposition on INS of a duty to negotiate and arbitrate if necessary is not inconsistent with Section 251 merely because this section does not itself impose such a duty. *See generally MCI Telecomm. Corp. v. New York Tel. Co.*, 134 F. Supp. 2d 490, 506 (N.D.N.Y. 2001) (finding that state commission order that ILEC provide "superior quality" service not inconsistent with Act's language that service be "at least equal" in quality).

In any case, Qwest contends that this Court need not decide whether the negotiations/arbitration process is "exclusive" where the party seeking compensation is not an ILEC. According to Qwest, the dispositive fact is the tariffs may not be used to establish compensation for LEC-CMRS interconnection for local traffic.

Additionally, Qwest contends that any argument made by INS that CMRS providers have "no incentive to negotiate" is foreclosed by the evidence presented to the Board. *See IUB Proposed Decision*, at 17, 22, 23, 24 (summarizing positions of CMRS providers such as Sprint Wireless, Verizon/US Cellular, and AT&T Wireless who all desired and attempted to negotiate with INS); *see also T-Mobile Wireless Termination Order*, at ¶¶ 15-16 (amending FCC rules to ensure LECs have the same ability to compel negotiations and arbitrations that CMRS providers have under the 1996 Act). Instead, INS appears to have been unimpressed with negotiation, preferring instead to unilaterally establish charges for transport and force Qwest to act as its billing agent.

Likewise, Qwest contends INS' assertions about the burdens on small carriers associated with proceeding under agreements as opposed to tariffs are contrary to the record before the Board, and have been rejected by the FCC. To alleviate any burden on themselves and INS, the CMRS providers advised the Board of their willingness to negotiate collectively with INS a "generic" or "template" agreement that would apply in all but "special circumstances". *IUB Proposed Decision*, at 17-18, 24. Moreover, the FCC rejected as a matter of law and fact the argument that the burdens on small carriers in using contracts justify the use of tariffs instead. *Policy and Rules Concerning Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20730, 20764, at ¶ 57 (1996; *see also id.* at ¶ 46 (rejecting argument that

increased "transaction costs" incurred to establish contracts with "literally millions" of customers justified the use of tariffs instead).

The Court finds it need not resolve the question of exclusivity raised by the parties. Based on the Court's conclusions that the Board acted within its authority in promoting negotiation/arbitration to reach reciprocal compensation agreements concerning the traffic at issue, and the fact that such determination does not violate federal law, the exclusivity argument becomes a collateral argument. The fact that the Board ruled is sufficient to render negotiation/arbitration the appropriate avenue to resolve the dispute between the parties, even if the Board may have had other remedial paths available.

4. IXC Exception

INS also argues that Qwest is acting as an interexchange carrier ("IXC") and is therefore subject to access charges billed even by carriers (including terminating carriers) who arguably would otherwise be limited to seeking reciprocal compensation. Thus, INS contends that even if the Court disagrees with the FCC decisions finding intermediary carriers are not governed by the reciprocal compensation rules, then the IXC exception to the intraMTA is a second reason why INS may collect its tariffed charges and why the FCC reasonably approved INS' tariff amendment.

As detailed above, the Court has already determined that Qwest is not an IXC with respect to the traffic at issue here. As a result, the Court need not delve further into the parties' arguments regarding the IXC exception to the reciprocal compensation rules. The Court does note, however, that again many of the arguments made by the parties are more

appropriate to the legislative and administrative process than to the judiciary applying the promulgated rules.

5. Commingling

INS maintains that, effectively, the IUB "punted" on commingling issues. According to INS, the IUB never resolved the issue of the commingling of traffic in its decisions, and the issue of whether Qwest provided sufficient information to INS to enable it to properly identify and bill the originating wireless carriers continues to be an issue in controversy. INS asserts this is not a threshold legal issue that can be resolved at the present time, but rather a material question of fact to be resolved by the Court after full discovery.

Contrary to INS' view, it seems more accurate to find the IUB did address the commingling issue by allowing that issue to be confronted along with other issues in the negotiation and arbitration process.[61] Since the Court finds the IUB did not

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[61] Qwest further contends that during the proceeding before the Board, it vigorously disputed -- and refuted -- INS' allegations that Qwest's use of the same trunk group to deliver intraMTA traffic and long distance traffic is improper. In particular, Qwest contends the record before the Board shows the following: (1) use of the same trunk group to carry and deliver local and long distance traffic, a practice sometimes referred to as "commingling", is very common in the telecommunications industry; (2) many wireline ILECs in Iowa themselves commingle local and long distance traffic; and (3) the purpose of commingling is not to disguise long distance traffic, but to take advantage of efficiencies through use of a single trunk group, particularly when traffic volumes are not sufficient to justify separate trunk groups. Qwest asserts that INS has not demonstrated that the Board's resolution of the trunking

err in either its conclusions that the traffic in this case is "local" and that the reciprocal compensation rules apply, the Court also finds the IUB's determinations with regard to commingling carry the day and need not be analyzed further. In short, the Court acknowledges negotiation as the appropriate route to resolution of the commingling issue and finds the Board's conclusion in that regard does not violate existing federal law.

6. Billing Information

Qwest contends the Board's authority to resolve the parties' dispute extends to INS' allegations regarding the sufficiency of the information available to it for purposes of identifying and billing the CMRS providers that originated the calls at issue. After hearing extensive evidence on the issues involved, the Board directed the parties to negotiate a resolution. Qwest contends the Board's resolution is entirely consistent with the 1996 Act's design "to promote negotiated binding agreements." *Iowa Utils. Bd. v. FCC*, 120 F.3d at 801.

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issue is arbitrary and capricious, as required to overturn a finding of fact by a state commission. Given its expertise on telecommunications in Iowa, the Board is obviously in the best position to determine, absent agreement of the parties, the costs and benefits of commingling in Iowa. *See Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 352 (6th Cir. 2003) ("[1996] Act gives state commissions latitude to exercise their expertise in telecommunications and the needs of the local market."). The Board did not prohibit commingling in the proceeding below, though it did reserve the right to revisit the issue upon the request of the parties absent a negotiated agreement. *See IUB Proposed Decision*, at 30.

INS disagrees, stating it is eminently unfair to allow the relationship between Qwest and INS to continue without requiring Qwest to pass along certain billing information to INS. INS asserts that without that information it is unable to appropriately bill the originating carriers for the termination of their calls. INS contends that its amended federal tariff accomplishes this result.

On this issue, the Court once again concludes that resort to the negotiation/ arbitration process espoused by the IUB is a reasonable manner in which to proceed. Like the commingling issue, the issue of billing information is the exact type of issue best resolved through the negotiation process. While there is appeal to the INS argument that insufficient billing information has been provided by Qwest, nothing in this record suggests the matter would not be resolved through negotiation and, if necessary, arbitration. More important, requiring this process does not violate federal law.

E. Tariffs

Given the Court's conclusion that the decisions of the Board do not violate federal law, the Court must move to an analysis of the tariff issues at the heart of this lawsuit. INS asserts its tariffs are valid and applicable in spite of the Board's determinations. Thus, according to INS, Qwest must pay INS under the terms of its tariffs. Qwest disagrees, arguing that INS' tariff filing is merely an attempt to bypass the Board's legally valid and enforceable decision.

Qwest essentially argues the FCC lacked jurisdiction to accept a tariff governing interconnection rates for intrastate wireless traffic. Qwest claims INS is attempting to unilaterally dictate the rates, terms, and conditions for the traffic at issue

through filing a tariff, and thereby overriding the applicable FCC and Board determinations. Qwest argues this move should be rejected for numerous reasons.

INS disagrees, arguing the FCC did have jurisdiction, properly accepted its amended federal tariff, and as a result of the filed tariff doctrine and its deemed lawful status, the tariff is valid and enforceable. INS claims this Court may construe the terms of the tariff according to its plain terms without the involvement of administrative agencies because the interpretation of the language in a tariff is a question of law for the judiciary. *Order on Pending Motions*, at 25-26.

1. Tariffs in General

Tariffs are not mere contracts, but they establish the "law", similar to a regulation or statute. *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); *Bryan v. BellSouth Communications, Inc.*, 377 F.3d 424 (4th Cir. 2004); *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000); *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 487-88 (2d Cir. 1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir. 1998); *MCI Telecoms. Corp. v. Teleconcepts*, 71 F.3d 1086, 1096 (3d Cir. 1995); *Western Union Int'l, Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecommunications Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993). "The terms of a tariff should be given their ordinary meaning, and strained or unnatural constructions are not permitted." *BellSouth Telecomms., Inc. v. Kerrigan*, 55 F. Supp. 2d 1314, 1324 (N.D. Fla. 1999) (citations omitted).

Here, INS asserts its federal tariff establishes federal law not subject to preemption, and that this Court should not second-guess the FCC's decision to accept the tariff. *See*

Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1170 (9th Cir. 2002) (finding "no one may bring a judicial challenge to the validity of a filed tariff"). INS urges the Court to construe the tariff as applicable to Qwest and the traffic at issue here.

2. Tariffs Involved

INS asserts that the INS tariffs on file with the FCC and the IUB establish Qwest is the customer liable for payment of calls carried before November 11, 2000. For calls carried prior to that date, INS asserts the FCC tariff governs interstate traffic and deems the customer the entity submitting an order for service, known as an Access Service Request, and the state tariff governs intrastate traffic and also treats the person submitting the Access Service Request as the customer. Qwest has admitted that it submitted Access Service Requests, and Qwest paid pursuant to the federal and state tariffs for intraMTA wireless-originated calls from the 1980s through April 1999.

INS contends that the Amended FCC Tariff establishes rules more favorable to Qwest for calls carried after November 11, 2000. Under the Amended FCC Tariff, Qwest is treated as the customer liable for charges only if it fails to promptly provide information requested by INS that would facilitate billing the wireless carriers that originate the calls. If Qwest provides the requested information, the wireless carriers are instead treated as the liable customer.

INS claims the amended federal tariff specifically governs intrastate as well as interstate wireless-originated traffic pursuant to the FCC's jurisdiction over intrastate wireless traffic under 47 U.S.C. § 332. INS states the tariff terms

clearly apply to the traffic at issue.[62] INS argues the amended federal tariff supersedes the state tariff for intrastate calls carried after November 11, 2000, with the state tariff providing an alternative ground for recovery in the event Qwest succeeds in its argument that the federal tariff has no application.[63] INS asserts that if Qwest contends it provided the requested information during the relevant times, such competing factual positions can be resolved through discovery.

Qwest, on the other hand, argues INS' position is completely inconsistent with the market-oriented changes to

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[62] The tariff provides:

> When an Intermediary Carrier delivers Transiting Traffic between a CMRS provider and Iowa Network, the Intermediary Carrier shall promptly provide Iowa Network with usage information for that CMRS provider. The usage information shall be in a form acceptable to Iowa Network and, at a minimum, be consistent with MECAB and MECOD guidelines and in EMI format and otherwise sufficient to facilitate the billing of the CMRS provider pursuant to this tariff. If the Intermediary Carrier does not provide the information requested by Iowa Network to accurately bill the CMRS provider, the Intermediary Carrier shall be the customer for purposes of this intrastate and interstate tariff.

[63] The state tariff does not contain a provision excusing an intermediary carrier like Qwest from liability if it promptly provides information requested by INS to facilitate billing. INS also asserts the amended FCC tariff confirms Qwest's absolute liability for calls carried prior to November 11, 2000, and so is an additional basis for those earlier calls. (Though INS does not explain how the tariff does this).

the Communications Act and is foreclosed by FCC and Eighth Circuit precedent. *See Iowa Utils. Bd. v. FCC*, 120 F.3d at 801 (holding the design of the 1996 Act is "to promote negotiated agreements"); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("*Verizon North I*") (recognizing "private negotiations" is "the centerpiece of the Act"); *Pac. Bell v. Pac-West Telecomm., Inc.*, 325 F.3d at 1127 (noting the 1996 Act is intended to "replace the comprehensive state and federal regulatory scheme with a more market driven system that is self-regulated through negotiated interconnection agreements"); *Equal Access NPRM*, at ¶ 2 (explaining that FCC decision under 47 U.S.C. § 332 are intended "to promote competition by refocusing competitors' efforts away from strategies in the regulatory arena"). Because tariffs are the antithesis of a market driven system, *see In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20730, 20731, 20760, 20762 (1999), *aff'd MCI WorldCom, Inc. v. FCC*, 341 U.S. App. D.C. 132, 209 F.3d 760 (D.C. Cir. 2000), Qwest urges the Court to find INS cannot override "regulatory barriers - i.e., decisions of the FCC and the Board as to the applicability of access charges, the carrier obligated to pay compensation for transport and termination of intraMTA traffic, and jurisdiction to resolve the foregoing - by the unilateral act of filing a tariff."

Qwest argues INS' position presupposes the unilateral authority of carriers to dictate substantive law, even extending to jurisdiction. In particular, INS claims its Iowa tariff governs compensation for calls at issue through November 11, 2000, and that its amended federal tariff governs calls

subsequent to that date.[64] Qwest contends that INS cannot shift the authority to determine the lawfulness of its charges or practices for intrastate calls from a state commission to the FCC by filing its amended federal tariff. Qwest argues that no decision or public interest consideration would support such an outcome.

3. Tariffs as Appropriate Method to Seek Compensation

INS concedes that a critical component of this case is whether INS can be required to negotiate or arbitrate interconnection agreements with wireless carriers. INS asserts that if the answer is in the negative, then tariffs provide an appropriate alternative to seek compensation for services performed. While this Court has found the IUB direction does not violate federal law, this "critical component" has been resolved adverse to the INS position. However, some additional discussion of the tariff issue is necessary to an understanding of the Court's analysis.

INS asserts the Section 252 interconnection negotiation/arbitration process is available only if the party receiving the interconnection/arbitration request is acting as an ILEC, and only ILECS who are not rural telephone

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[64] Further, Qwest contends INS cannot argue in the alternative that it may declare its federal tariff apply retroactively, i.e., prior to November 11, 2000, through its tariff filing. Retroactive rate changes that are required or even authorized by an agency violate the rule against retroactivity, "a cardinal principal of ratemaking." *City of Piqua v. FERC*, 610 F.2d 950, 955, 198 U.S. App. D.C. 8 (D.C. Cir. 1979). According to Qwest, if an agency may not authorize retroactive application of rates and terms, neither may a carrier do so unilaterally.

companies are under a duty to negotiate/arbitrate. *See* 47 U.S.C. §§ 251(c)(1), 251(f)(1); 252(a)(1), 252(b)(1). Here, neither INS nor the parties it seeks to charge are ILECs for purposes of this case. INS is, however, an LEC[65] and a rural telephone company. Qwest is not acting as an ILEC, *INS v. Qwest II*, 363 F.3d at 694 n.3, and the wireless carriers by statutory definition are not even LECs. *See* 47 U.S.C. § 153(26) . Thus, INS asserts the Section 252 interconnection negotiation/arbitration process is unavailable here as the statutory design only applies to ILECs, and none of the parties are classified as such here.

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[65] INS asserts that it, rather than Qwest, is providing the LEC portion of the call routing. INS explains,

> In the switching hierarchy, a local exchange carrier operates the end office that does the final switching of the call for delivery of the call to the called party. The same or (as in this case) a different LEC will own the tandem switch (next highest level in the hierarchy) that switches the call to the end office switch. Above that level, the transmission between tandem switches is an IXC rather than a LEC function. INS provides the tandem switching to the rural ILEC end offices, and so functions as an LEC. 47 C.F.R. § 69.111(a)(2). Moreover, the centralized equal access services provided by INS are specifically mentioned in Part 69 of the FCC's rules (regulations governing access charges), *see* 47 C.F.R. § 69.112(1), demonstrating that INS's services are governed by the access charge regime . . . By contrast, Qwest provides a tandem-to-tandem transiting service, consistent with the IXC function. This distinguishes Qwest's function here from the case in which a large ILEC provides the tandem switch that directs the call to the end office switch owned by the rural LEC seeking access charges.

INS further asserts that as a nonincumbent LEC, it is entitled to file a Section 204(a)(3) tariff with the FCC. INS argues that permitting tariffs to be used is consistent with the intent of Congress to promote competition and prohibit activities that prevent such competition. *Michigan Bell Tel Co. v. MCIMetro Access Trans. Servs., Inc.*, 323 F.3d 348, 360-61 (6th Cir. 2002).

It is undisputed that as of the enactment of the 1996 Act, and for three years thereafter, Qwest was paying INS for the traffic at issue pursuant to the INS access tariffs, and that Qwest had been doing so since the 1980s. INS next contends 47 U.S.C. § 251(g) allows for the carry forward of interstate and intrastate access charges until superceded by FCC regulation. 47 U.S.C. § 251(g). This section provided LECs would continue to be subject to the same "equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)" to which they had previously been subject. *Id.* INS argues the carry forward provision of Section 251(g) clearly contemplates the access charge regime established by INS' tariffs be continued until interrupted by FCC action.

INS further argues that Qwest improperly relies on the "local" terminology to support its argument that intermediary carriers are barred from collecting access charges for transiting intraMTA traffic. INS contends the FCC has abandoned the "local" terminology, and asserts the important issue is whether or not the charges are governed by the reciprocal compensation rules of the 1996 Act. *See ISP Remand Order*, at ¶ 45 (reasoning that eliminating the category of "local" traffic better reflects the role of section 251(g) in distinguishing between charges that are governed by reciprocal compensation rules and charges that are governed by the access rules).

Regardless of the terminology used, INS argues that the FCC's separate decision not to regulate the charges of intermediary carriers leaves those carriers free to impose "transiting charges" equal to their former "access charges". *See Verizon Virginia Order*, at ¶¶ 115-117 (rejecting attempt to limit Verizon's transit charges to the forward-looking cost standard governing ILEC reciprocal compensation charges, thereby allowing Verizon to charge higher rates set by Verizon). Thus, according to INS, any objection to charging "access charges" is at most a matter of semantics, and to avoid a semantical debate, INS' amended federal tariff describes the traffic at issue as "transiting" traffic and imposes a charge for carrying it.

Finally, INS asserts that the determination of who it decides to charge for its services as a transiting carriers is its own. In other words, INS argues it is not limited to the decision of Qwest to bill the originating carriers nor Qwest's contractual agreement with those carriers that Qwest is not liable for transiting charges on INS' system. INS reiterates that the FCC has refrained from adopting specific rules governing transiting carrier charges, *see id.*, and that INS' decision to charge the originating carrier, unless a previous transiting carrier fails to pass on information requested by INS to facilitate billing the originating carrier, is eminently reasonable and fair.[66]

Qwest argues that Congress did not in the 1996 Act provide for the "continuation of all pre-existing charging systems" as INS contends. Rather, Congress provided only

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[66] INS argues the FCC acceptance of its tariff demonstrates the FCC finding that such tariff changes were reasonable. This will be discussed *infra*, at sections E.4 and E.10.

that LECs would continue to be subject to the same "equal access and nondiscriminatory interconnection restrictions and obligations" to which they had previously been subject, until the FCC determined otherwise. *See* 47 U.S.C. § 251(g). Thus, according to Qwest, Section 251(g) was never intended to confer *benefits* on LECs as INS implies.

Further, because the FCC had required prior to the 1996 Act that the rates and terms applicable to LEC-CMRS interconnection for traffic classified as "local" be established through interconnection agreements, not tariffs, INS' use of tariffs for the traffic at issue here could not, by definition, be a practice that is "carried forward" under the Act. Finally, Section 251(g) expressly authorizes changes by the FCC to the intercarrier compensation regime, which includes changes in the criteria used to determined whether wireless traffic is classified as "local" or "long distance" for the purpose of determining the applicability of access charges. Qwest contends the FCC made such a change in its *Local Competition Order* when it determined that calls that are placed and received in the same MTA would be classified as local.

The Court has already determined the Board did not err when it defined the traffic at issue as "local" traffic not subject to access charges, nor did the Board err in holding the appropriate manner of compensation was through reciprocal compensation arrangements arrived at by negotiation/arbitration. The Court finds, and INS seems to recognize in its arguments, that the tariffs become important only if INS cannot be required by the IUB to enter the negotiation/arbitration process. This is, however, within the power of the IUB as outlined above and is consistent with the thrust of the 1996 Act. The Court further agrees with the Board that this situation, under the essentially changed ground

rules of the 1996 Act, presents a situation clearly appropriate for negotiation/arbitration, which addresses all of the complicating factors such as the role of the wireless carriers, the commingling of calls, and the proper level of compensation for all parties.

Pursuant to these determinations, and their interpretation of the 1996 and FCC implementing decisions, the Court finds the original federal tariff and the state tariff inapplicable to the traffic at issue. These tariffs purport to charge access charges, thinly veiled as transit charges, which are unavailable for this type of traffic following passage of the 1996 Act. Moreover, the Court finds the amended federal tariff is an attempt by INS to sidestep the decision of the Board, and therefore contradicts the legal framework for "local" traffic as provided in the 1996 and the FCC's subsequent decisions. The Court does not allow a tariff pursued as a device to defeat the ongoing regulatory process to thwart the authority of the IUB. The Court discerns no applicable legal precedent and no policy basis that would allow the amended federal tariff to override the thrust of the 1996 Act and the properly exercised authority of the IUB.

Accordingly, the Court finds the tariffs asserted by INS are not the controlling method of compensation for the transport of the traffic at issue. The appropriate avenue is through negotiation/arbitration to reach reciprocal compensation agreements. In making this determination, the Court is not examining the terms and provisions of the tariff, the procedure by which it was obtained, or otherwise intending to invade the jurisdiction of the FCC. Instead, the Court is finding the tariffs do not effectively displace the 1996 Act and the valid IUB decision. INS' filing of the amended federal tariff was a strategic attempt to thwart the impact of the 1996 Act, to seek some certainty in a field plagued by

uncertainty, and to create an alternative to any adverse determinations of the IUB. Accordingly, the Court finds the tariffs at issue do not apply to the traffic at issue, and Qwest cannot be held liable under their terms. Under the current state of the law, compelling arguments may be made on both sides of this issue; and this collision of concepts may demand further attention by the Congress and the FCC. However, this Court must make a determination between these fundamentally competing concepts, and does so on the basis of current law.

The Court further finds it need not extensively analyze the parties' additional arguments concerning tariffs in light of the Court's underlying determination that the tariff is not applicable to the traffic at issue. These arguments include FCC jurisdiction and regulation versus state commission jurisdiction, conflict preemption, the "filed tariff" doctrine, "deemed lawful" status, and the validity and enforceability of the tariff language. Simply put, the Court has not engaged in any analysis of the terms of the tariff and none of these issues upsets the Court's determination regarding the applicability of the tariffs to the traffic at issue.

4. The FCC's Recent *T-Mobile Wireless Termination Order*

During the pendency of the present motions, the FCC released its *T-Mobile Wireless Termination Order*. The T-Mobile petitioners had sought a declaratory ruling that "wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the

transport and termination of traffic." *T-Mobile Wireless Termination Order*, at ¶ 1.[67]

INS asserts this order supports its position with regard to the propriety and applicability of its filed tariffs. In the *T-Mobile Wireless Termination Order*, the FCC ruled that under existing FCC rules it was not unlawful "per se" for LECs terminating wireless-originated calls to collect charges from wireless carriers through the use of termination tariffs. *T-Mobile Wireless Termination Order*, at ¶ 9. The FCC found that nothing in its rules prevented the use of tariffs in a manner that did not conflict with an agreement negotiated or arbitrated pursuant to Section 252 of the Communications Act. *Id.* at ¶13. According to INS, this confirms Qwest was wrong in arguing tariffs are an unlawful means for charging for wireless-originated traffic and that section 252 is the exclusive means for establishing interconnection compensation arrangements.

INS asserts that Qwest and INS do not have a negotiated or arbitrated section 252 agreement with which its federal tariff could conflict.[68] INS argues that as a result, the *T-*

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[67] The T-Mobile petitioners asserted that "such tariffs are unlawful because they (1) bypass negotiation and arbitration procedures in sections 251 and 252 of the Act; (2) do not provide for reciprocal compensation to commercial mobile radio (CMRS) providers; and (3) contain rates that do not comport with the Total Element Long-Run Incremental Cost (TELRIC) pricing methodology as required by the Commission's rules." *T-Mobile Wireless Termination Order*, at ¶ 1.

[68] INS also reiterates that as a *federal* tariff reviewed by the FCC before going into effect, the amended federal tariff is not even subject to the kind of post-effective date preemption attacks

Mobile Wireless Termination Order indicates there is nothing to prevent INS from enforcing the tariff in this case.

The FCC went on to prospectively amend[69] Rule 20.11 to provide that "[l]ocal exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." New 47 C.F.R. § 20.11(e) (taking effect 30 days after publication in the Federal Register). INS asserts that to the extent any commingled calls that Qwest delivers to INS after the effective date of the new rules are intraMTA wireless-originated calls, new rule 20.11(e) will need to be considered but will not impact this case. First, INS' tariff seeks to impose charges on a *landline* carrier that commingles calls whereas the new rule, by its language, governs only the imposition of charges on *wireless* carriers.[70] Second, INS points out the new rule applies to traffic "not subject to access charge,"[71] but contends the wireless-originated portion of the

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mounted unsuccessfully by the petitioners in the T-*Mobile Wireless Termination Order*. *See* discussion *infra*, at section E. 10.

[69] As a new administrative rule, Rule 20.11(e) has no retrospective effect. T-Mobile Wireless Termination Order, at ¶ 1.

[70] INS notes that the FCC in the *T-Mobile Wireless Termination Order* recognized the existence of disputes regarding whether a terminating LEC may charge an intermediary landline carrier for wireless-originated calls, but did not resolve those disputes. *T-Mobile Wireless Termination Order*, at ¶ 6; new rule 20.11(f). Thus, INS argues the resolution of this issue in the present case is governed by INS' "deemed lawful" tariff.

[71] INS notes that the FCC in the T-*Mobile Wireless Termination Order* again recognized but did not resolve the dispute regarding

commingled traffic delivered by Qwest is in fact subject to access charges due to Qwest's actions in delivering such traffic over interexchange trunks as interexchange traffic.[72] Finally, the new rule governs payment of reasonable compensation to the terminating carrier, *id.* at ¶ 2, and thus, like the parallel reciprocal compensation rules, Rule 20.11 only governs the charges of terminating carriers and not intermediary carriers such as INS.[73]

Qwest disputes INS' reading of the impact of the *T-Mobile Wireless Termination Order* and contends that it provides no basis for denying Qwest's motion for summary judgment. Qwest maintains the FCC merely held that prior to the effective date of the *Order*, *state* tariffs accepted by a state commission establishing the rates and other terms for transport and termination of intraMTA calls were not "*per se*" invalid under federal law. *Id.* at ¶ 10 n.40.

Qwest finds it important that the FCC did not hold *federal* tariffs lawful, but instead deliberately limited its holding to *state* tariffs. *See id.* at ¶¶ 7, 9, 10. Specifically, the FCC observed that its pre-Act decisions had "acknowledged that the intrastate portions of interconnection arrangements are sometimes filed in state tariffs," but had "specifically declined to preempt state regulation of LEC intrastate interconnection

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whether intraMTA wireless-originated traffic delivered through a landline intermediary carrier constitutes access traffic. *T-Mobile Wireless Termination Order*, at ¶ 6. INS asserts that its amended federal tariff uses generic language so that the right to charge does not depend on how the traffic is classified or labeled.

[72] *See* discussion *supra*, at sections C.2.b and D.4.

[73] *See* discussion *supra*, at section D.2.a.

rates applicable to CMRS providers." *Id.* at ¶ 10. Based on this, Qwest contends the *T-Mobile Wireless Termination Order* confirms the jurisdiction of state commissions over intrastate interconnection rates, and that allowing a carrier to preempt this jurisdiction by filing a federal tariff contravenes the *Order* and the pre-Act decisions relied upon by the FCC.

Contrary to INS' assertion, Qwest argues the *T-Mobile Wireless Termination Order* confirms that the FCC's pre-Act decisions intended that CMRS interconnection issues would be resolved in "negotiated agreements between the parties," and further "express[ed] an expectation that tariffs would be filed only after carriers have negotiated agreements." *Id.* at ¶ 11. Indeed, the *Order* reaffirms and states clearly the FCC's "clear preference for contractual arrangements for non-access" traffic. *Id.* at ¶ 14.

In any event, Qwest points out that the *T-Mobile Wireless Termination Order* is clearly limited to tariffs that" apply only in the absence of an agreement," *id.* at ¶ 13, and does not apply to tariffs that "purported to apply even when a valid interconnection agreement could be in place." *Id.* at ¶ 13 n.53 (approving prior use of tariff that was "expressly subordinate to approved agreements). Qwest argues that INS' tariff purports to establish the terms and conditions governing INS' transport of calls from a subscriber of a CMRS provider and makes no exception for calls that are subject to an existing interconnection agreement. *See* INS FCC Tariff No. 1, section 16.1, orig. pg. 186, issued October 27, 2000.

Finally, Qwest argues that nothing in the *Order* authorizes a carrier to unilaterally impose the compensation obligation on the transit carrier, as this would be a violation of the

FCC's "calling party's network pays" principle.[74] Qwest asserts the *T-Mobile Wireless Termination Order* thus confirms the originating CMRS providers must compensate other carriers providing transport and/or termination even where there is an indirect interconnection and the transiting carrier commingles the calls.

The Court first finds the FCC's discussion in the. *T-Mobile Wireless Termination Order* was merely a clarification of existing standards, and not a change in the law. As a result, the IUB's subsequent determinations related to reciprocal compensation and the obligations of the parties was also in accordance with federal law. While several of these issues have not been expressly determined by the FCC, such determinations by the state commission are entirely appropriate in the absence of such express conclusions. Thus, the IUB was within its authority to find Qwest was not acting was not obligated to pay access charges and that the terminating LECs needed to seek compensation from the originating carriers under a reciprocal compensation arrangement. The Court further repeats that the IUB also did not offend federal law in strongly suggesting the parties (including the transiting carriers) negotiate reciprocal compensation arrangements, and if those negotiations failed, to seek arbitration before the Board. As noted in the *T-Mobile Wireless Termination Order*, the FCC strongly encourages negotiation/ arbitrations in accordance with its "strong preference for contractual arrangements. "*T-Mobile Wireless*

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[74] The "calling party's network pays" principle, or CPNP, has been explained by the FCC as its "existing access charge rules, and the majority of reciprocal compensation agreements, require the calling party's carrier, whether LEC, IXC, or CMRS, to compensate the called party's carrier for terminating the call." *Intercarrier Compensation NPRM*, at ¶ 9.

Termination Order, at ¶ 9. Accordingly, the Court finds the actions undertaken by the Board and this Court's determination that INS' amended tariff is not applicable to the traffic at issue here in light of the IUB's decisions are entirely appropriate and consistent with the aims of the 1996 Act, the FCC's implementing decisions, and the *T-Mobile Wireless Termination Order*.

F. The Self-help Claim

INS' Amended Complaint alleges that Qwest's refusal to pay in accordance with the terms of INS' FCC Tariff and Amended FCC Tariff constitutes unjust, unreasonable, and unlawful self-help in violation of 47 U.S.C. § 201(b).[75] As a result, INS maintains that it is entitled to monetary damages and attorneys' fees pursuant to 47 U.S.C. § 206.

Section 201 provides, in relevant part, that "[a]ll . . . practices . . . for and in connection with such communications service, shall be just and reasonable, and any such . . . practice . . . that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b). INS argues the FCC has found the refusal of a carrier to pay for services ordered and received amounts to impermissible self-help and a violation of section 201(b). *See MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647, at ¶ 27 (1999).

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[75] The self-help count was one of two claims added in Plaintiff's Amended Complaint, which was the subject of this Court's December 2, 2004, Order. In that order, the Court granted Plaintiff leave to amend, holding Plaintiff did not unduly delay in seeking to amend its Complaint and that the self-help claim was not futile.

Indeed, "the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties." *Comunique Telecomms., Inc.*, Declaratory Ruling and Order, 10 FCC Red 10399, 10405 (1995) (citing *Tel-Central of Jefferson City Missouri, Inc.* Memorandum Opinion and Order, 8 FCC Rcd. 8318, 8339 (1989), *City of Gerard v. FERC*, 790 F.2d 919, 922-23, 252 U.S. App. D.C. 358 (D.C. Cir. 1986), *AT&T Co. v. Florida-Texas Freight, Inc.*, 357 F. Supp. 977, 979 (S.D. Fla. 1973), *aff'd per curiam*, 485 F.2d 1390 (5th Cir. 1973), and *Mocatta Metals Corp. v. ITT World Communications Corp.*, 54 FCC2d 104, 105 (1975)). INS asserts that carriers that claim tariff rates are unreasonable "may file complaints with the Commission under [47 U.S.C. § 208], but may not automatically withhold payments of legally tariffed charges merely by asserting that the rates are unreasonable." *Id.* (citing *Business WATS, Inc. v. AT&T Corp.*, 7 FCC Rcd 7942 (1992) (finding a customer is not entitled to the self-help measure of withholding payment for tariffed services duly performed, but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper), and *MCI Telecomms. Corp.*, 62 FCC2d 703, 706-07 (1976) (finding customers may not withhold payment of properly billed tariffed charges for voluntarily ordered services)).[76]

To prevail on its self-claim, INS must prove Qwest unlawfully withheld payment due under the terms of valid and

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[76] While INS is proceeding under federal law, Iowa law also appears to recognize the prohibition against self-help. *See AT&T Communications of the Midwest v. Iowa Utils. Bd.*, 687 N.W.2d 554, 562 (Iowa 2004) ("AT&T cannot institute a challenge to the [tariffed] rate merely by not paying the bill.").

applicable tariff. The Court discussed these issues above and will not repeat them here.[77]

Qwest argues that its nonpayment of amounts invoiced to it for transit traffic does not give rise to a cause of action for "self-help". First, Qwest maintains INS' self-help claim depends on a finding, foreclosed by law,[78] that Qwest is liable to INS under INS' federal tariff.[79] Qwest argues that there can

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[77] The Court's Order on Pending Motions admonished the parties that their supplemental briefs were to be "limited to the new issues raised in the Amended Complaint, i.e, the self-help and quantum meruit counts." Qwest contends INS' supplement in opposition of summary judgment violated this order by repeating arguments to support its tariff claims and adding extensive new arguments that its tariffs should be construed to impose liability on Qwest. Qwest contends INS should have incorporated by reference any arguments related to the tariff claims applicable also to the self-help claim. Qwest further contends INS' violation is prejudicial to Qwest.

The Court finds, however, that any improper arguments made by INS are not prejudicial to Qwest. The repeated arguments are mere surplusage, and the allegedly new arguments are similar enough to previously filed arguments to not be considered novel or surprising. In any event, Qwest has had opportunity to respond to all of the arguments made by INS and has not been prejudiced by their inclusion in this Court's analysis.

[78] *See* discussion *supra*, at section E.

[79] INS itself conceded that this count does not state additional grounds for liability but was asserted for the purpose of seeking attorneys' fees. *Order on Pending Motions*, at 12 (noting INS' assertion that the self-help claim was advanced to make additional remedies, specifically recovery of attorneys' fees, available and not as an additional ground for liability).

be no violation of section 201 based on nonpayment of amounts not actually owed. In that vein, Qwest argues its conduct is materially distinguishable from the sole case cited by INS in support of its self-help claim in that the defendant in that case withheld payment for charges for which it was ultimately found liable. *See MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd. 11647 (FCC 1999) (finding that plaintiff's tariff lawfully imposed liability on the defendant for the amounts the defendant had withheld). In addition, unlike the defendant in the case cited by INS, Qwest filed with the IUB - the agency that regulates and supervises intrastate transport of telephone calls within the State of Iowa - its petition for declaratory ruling, and the Board held Qwest was not liable to INS for access charges, leaving to future negotiation the determination of any applicable compensation, thereby confirming the reasonableness of Qwest's actions.[80]

In finding Qwest is not liable to INS under the Amended FCC Tariff, and that the original federal tariff is no longer applicable, it follows INS' self-help claim is likewise not applicable. Accordingly, the Court must grant Qwest's motion for summary judgment on this claim.

G. Unjust Enrichment

In a prior ruling, this Court found that Qwest received no benefit from INS' service, and therefore INS' unjust enrichment claim failed as a matter of law. In reaching that ruling, the Court relied on the finding that Qwest was an

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[80] Qwest also asserts that if any party to this litigation engaged in self-help it was INS through its unilateral filing of its Amended Federal Tariff in an attempt to circumvent the jurisdiction and decision of the IUB.

"involuntary intermediary" compelled by the Communications Act to continue delivering wireless calls to INS. *INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at *32, 35. On appeal, the Eighth Circuit disagreed that Qwest was acting involuntarily as it was not functioning as an ILEC or LEC "with respect to the traffic here at issue." *INS v. Qwest II*, 363 F.3d at 694 n.3. The Eight Circuit also found this Court improperly relied on the IUB's determination in finding Qwest was not a beneficiary of INS' services. *Id.* at 694. The appellate court then reinstated the unjust enrichment count and left the issue open, "as the proper treatment of the claim depends on the disposition of INS's other claims." *Id.* at 695.

To support an unjust enrichment claim, "it is essential merely to prove that a defendant has received money which in equity and good conscience belongs to the plaintiff." *In re Estate of Stratman*, 231 Iowa 480, 1 N.W.2d 636, 642 (Iowa 1942). Because "unjust enrichment does not occur in the abstract," the Court will look to "federal statute[s] for guidance in determining whether one has . . . been unjustly enriched," *see Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1296, 1299 (8th Cir. 1980), with said statutes being the provisions of the Communications Act in present act[ion] *v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, [2] WL 31296324, at *31.

INS asserts that there remain genuine issues of material fact on its unjust enrichment claim. According to INS, all Qwest had to do to end liability to INS for wireless-originated calls was to stop forwarding those calls to INS or, for calls carried after the effective date of the Amended Federal Tariff, provide INS with the requested information to allow INS to

directly bill the wireless carriers.[81] Instead, Qwest continued to deliver those calls. INS asserts that Qwest did this knowing that INS expected payment from Qwest.

INS further asserts that a reasonable trier of fact could find that Qwest received a benefit from INS' service. By delivering the calls to INS for eventual delivery to the independent LEC's and their customers, Qwest effectively extended *de facto* the value and reach of its network, thereby allowing Qwest to sell the wireless carriers access not only to Qwest's network but also to INS' network which reaches nearly every rural ILEC in Iowa. Qwest could have protected itself by insisting on and negotiating the pass-through of INS' charges. *See INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at * 33. As INS argues, "proving unjust enrichment does not require complicated technical or legal arguments," 2002 U.S. Dist. LEXIS 19830, [WL] at *31, and INS maintains it has provided sufficient evidence to avoid summary judgment on this issue.

Qwest, on the other hand, argues that INS' claim for unjust enrichment should be dismissed as a matter of federal and state law for two reasons: (1) federal and Iowa law prohibit equitable or other remedies that would have the effect of bypassing applicable regulation; and (2) the record before the Board establishes that Qwest has received no money that belongs to INS.

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[81] Another alternative discussed by the parties was for Qwest to deliver calls originated by third-party wireless carriers on a separate trunk (i.e., not commingled), which would have allowed INS to isolate and block nonpaying traffic. INS asserts that it was unable to identify and block in real time calls because Qwest commingled calls and delivered all of them to INS on the same trunks.

It is well-settled that a claim for unjust enrichment must be dismissed if applicable federal or state regulation provides a compensation mechanism to the plaintiff. *See, e.g.*, Iconco, 622 F.2d at 1296; *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 986 (7th Cir. 2000); *Equal Access Corp. v. Utils. Bd.*, 510 N.W.2d 147, 150 (Iowa 1993). According to Qwest, the FCC and the Iowa Legislature "clearly intended intercarrier compensation to be determined by the Board based on regulatory laws and principles, not by the courts based on general principles of 'equity.'"

In the present case, the Board determined INS should seek compensation from the originating third-party wireless carriers through a negotiated (or Board arbitrated) interconnection agreement, and that any such agreement would apply retroactively.[82] Qwest argues this is consistent with federal and state law,[83] and therefore the equitable remedy of an unjust enrichment claim may not be invoked to bypass this regulatory remedy. *See Union Tel. v. Qwest*, slip op. at 34 ("Equitable doctrines cannot apply to relieve [plaintiff] of its obligation to comply with state and federal regulatory requirements. Positing arguments that compensation may be appropriate in the face of such

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[82] No CMRS provider has objected to the Board's ruling. INS does, however, renew its arguments that the remedy suggested by the IUB, i.e., negotiation of interconnection agreements, is not available to INS, and the IUB cannot require INS to negotiate an interconnection agreement. *See* discussion *supra*, at section D.2.

[83] *See* discussion *supra*, at sections D.2 and D.3.

overwhelming failure to comply with the applicable requirements is unavailing.").[84]

Qwest next contends INS' unjust enrichment claim fails because it cannot show Qwest received "'money which in good conscience belongs to [INS],'" *INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at *14 (quoting *In re Estate of Stratman*, 1 N.W.2d at 642), as Qwest received no money for the transport by INS of the traffic at issue. Qwest urges this Court to again find no benefit accrued to Qwest. *See INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at *15 (citing *3 Rivers Tel. Coop. v. U.S. West*, 125 F. Supp. 2d 417 (D. Mont. 2000) ("Plaintiff . . . argue that . . . U.S. West is liable for the terminating access charges having received the benefit of those transactions. But where is the benefit? If U.S. West is not the end user's long distance carrier, and therefore lacks the ability to receive any compensation through billing for that call, no benefit accrues to U.S. West for which it should be asked to pay charges to an independent [LEC]."), *rev'd and remanded on other grounds*, 45 Fed. Appx. 698, 2002 WL 1986469 (9th Cir., 2002)).

Qwest further contends the compensation it receives from the CMRS providers is for the use of *Qwest's* network, and not for the use of *INS'* network. In addition, Qwest's agreements with the originating CMRS providers make clear that compensation owed to INS and its ILEC owners for their

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[84] In *Union Tel. v. Qwest*, the court found applicable the regulatory scheme delineated in section 252 of the Communications Act. As discussed above, INS urges the Court to find the scheme inapplicable.

transport and termination of the traffic at issue is a matter separate from compensation for the use of Qwest's facilities.

Finally, Qwest contends that INS' factual allegations are insufficient to support a claim for unjust enrichment. As to the "value and reach" benefit argument advanced by INS, Qwest argues such a theory is overbroad in addition to not meeting the requirement that INS show Qwest received money belonging to INS. Indeed, INS can provide no evidence to support a finding that some of the compensation received by Qwest was for the use of INS' network.[85] Qwest also contends that INS identifies no law requiring Qwest to cease providing transiting service to the CMRS providers[86] or requiring Qwest to serve as INS' billing agent by collecting and remitting to INS its charges. Finally, Qwest argues that INS' assertion that its unjust enrichment claim will "motivate" Qwest to become INS' billing and collection agent is unsupported by state or federal law.

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[85] Qwest contends that any such evidence, though none was even alleged by INS, would be mere conjecture and speculation. *See Wilson v. IBM Corp.*, 62 F.3d 237, 241 (8th Cir. 1995)(finding that "to withstand motion for summary judgment, the non-moving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor based on more than mere speculation, conjecture or fantasy") (quotations and citations omitted); *Nagle v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 790 F. Supp. 203, 205 (S.D. Iowa 1992) (finding summary judgment "opponent must do more than simply show there is some metaphysical doubt as to the material facts").

[86] Qwest further asserts its offer to provide transiting service, if not required to do so, "was manifestly pro-competitive and pro-consumer, because it enabled the CMRS providers (and their customers) to avoid the costs they would have incurred to connect directly with INS." *See IUB Proposed Decision*, at 30.

INS disputes Qwest's assertions, contending first that Qwest conveniently forgets the equitable remedy suggested by the IUB, i.e., negotation of interconnection agreements, is not available to INS. Therefore, INS has sought compensation through its filed tariffs. If the Court determines the tariffs do not apply for some reason, INS seeks compensation through its unjust enrichment claim stating, "[i]t is not equitable for INS to provide a valuable service to Qwest, but not have the ability to be paid for that service."

INS continues and contends that the *Iconco* case actually supports INS' position in that the court allowed the losing contestant for a government contract to sue the winning contestant for unjust enrichment rather than pursuing the available regulatory remedy of protesting the contract award. *Iconco*, 622 F.2d at 1296. The court reasoned that the existence of a federal remedy should not preempt unjust enrichment "unless that was the clear and manifest purpose of Congress." *Id.* ("[W]e should not find that Congress intended to deny Iowa the right to vindicate in its chosen manner its overriding state interest in redressing unjust enrichment and fraud, an interest historically and deeply rooted in its common-law tradition, unless that was the clear and manifest purpose of Congress.").

INS asserts there is nothing in the Communications Act requiring INS negotiate an interconnection agreement or forfeit the right to all payment. INS asserts that because the FCC created the reciprocal compensation remedy to benefit terminating carriers, it is highly doubtful that INS as an intermediary carrier has such a remedy against the wireless carriers. *See Texcom Reconsideration Order*, at ¶ 4; *Mountain Communications*, at ¶ 3. INS asserts further that even if such a remedy exists, INS may still pursue an unjust enrichment claim. *See WorldCom, Inc. v. Graphnet, Inc.*, 343

F.3d 651, 657 (3d Cir. 2003) (finding that failure to comply with a Communications Act requirement involving procedures for establishing a contract or tariff would not bar an unjust enrichment claim);[87] *see also State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 155 (Iowa 2001) ("The adequacy of a legal remedy is a general limitation on the exercise of equity jurisdiction and is properly considered when restitution is sought in equity but no independent principle exists that restricts restitution to cases where alternative remedies are inadequate). Moreover, INS asserts the statutory presumption noted in *Bastien v. AT&T Wireless Services, Inc.* is not

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[87] INS asserts this case is better reasoned than the unpublished Wyoming District Court opinion relied upon by Qwest. *Cf. Union Tel. v. Qwest*, slip op., No. 02-CV-204-D (D. Wy. May 11, 2004). INS notes that the court in *Union* relied on this Court's 2002 *Ruling on Motion to Dismiss*, which was subsequently reversed by the Eighth Circuit. Consequently, there is currently pending in *Union* a motion to amend the judgment. In addition, INS draws attention to the fact that the plaintiff in that case is an ILEC under the 1996 Act, a status not shared by INS in the present action.

Qwest counters that this case is easily distinguished from the present action as there was no remedy available *in Worldcom, Inc. v. Graphnet, Inc.* Qwest contends that Congress in no way intended to grant the option to bypass remedies provided by state agencies which were charged with administration of the 1996 Act, and the FCC in fact questioned the availability of an unjust enrichment claim under the rule previously discussed. *See In re Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd. 13192, at ¶ 13 n.40 (2002) (citing *Bastien*, 205 F.3d at 986). Qwest further asserts the Board's decision forecloses any doubt that INS has a remedy against the wireless carriers as the IUB expressly provided a remedy that remains available to INS, i.e., retroactive application of the results of the negotiation/arbitration process.

implicated in this case as the present action does not concern rates charged by wireless carriers. *Bastien*, 205 F.3d at 986-87; 47 U.S.C. § 332(c)(3) (providing that states may not set rates charged by wireless carriers); *see also Phillips AT&T Wireless*, 2004 WL 173785 (S.D. Iowa Jul. 29, 2004) (finding complete preemption for actions concerning market entry or rates and remanding the matter because it did not concern rates). Additionally, INS maintains that the fact that the alleged remedy is against third parties rather than Qwest undermines Qwest's argument.

The FCC has acknowledged the potential availability under state law of unjust enrichment and quantum meruit in the absence of an applicable tariff. *See In re Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges, Declaratory Ruling* 17 FCC Rcd. 13192, at ¶ 12 (2002). Iowa law also permits parties with a contract to recover for unjust enrichment on a point not covered by the contract, *see Sulzberger Excavating, Inc. v. Glass*, 351 N.W.2d 188, 194 (Iowa 1984) ("An implied contract on a point not covered by an express contract is not superseded by the express contract."), and the Eighth Circuit similarly reasoned in this case that an unjust enrichment claim may exist if this Court determines the federal tariffs inapplicable. *INS v. Qwest II*, 363 F.3d at 694-95.

INS also argues that allowing its unjust enrichment claim furthers Congress' intent in passing the 1996 Act and the FCC's implementing policies. INS essentially contends that holding Qwest liable to INS will motivate Qwest to pass along those costs to the originating carriers, the same parties Qwest agrees should be responsible for compensation. In this manner, both Qwest and INS will be compensated for use of their networks. INS argues charging Qwest is equitable given Qwest's resistance to providing INS with requested

information to facilitate billing and because Qwest voluntarily sent commingled calls knowing INS expected payment.

Finally, INS maintains the benefit element is satisfied in the present case. INS asserts that a benefit may be "any form of advantage", *Okoboji Camp Owners Coop. v. Carlson*, 578 N.W.2d 652, 654 (Iowa 1998), and need not come directly from the plaintiff,[88] *Iconco*, 622 F.2d at 1302 ("[W]e find no requirement in the cases that the plaintiff itself must have conferred the benefit sought to be recovered from the defendant."); *Helm Fin. Corp. v. Iowa N. Ry.*, 214 F. Supp. 2d 934, 988 ("[I]t is not essential that the party seeking restitution paid money directly to the recipient."); *see also Credit Bureau Enters, Inc. v. Pelo*, 608 N.W.2d 20, 27 (Iowa 2000). INS reasserts its "value and reach" benefit theory that Qwest was paid by the wireless carriers for a service that was worthless without INS' assistance and that this service extended the reach of Qwest's network to include the entire INS network (against INS' wishes) through commingling calls.

Whether there exists a viable common law unjust enrichment claim sufficient to survive summary judgement may be negated if there exists an express contract. In

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[88] Qwest contends that this argument misses the point, which is that Qwest received no benefit from any party "which in equity or good conscious belongs to" INS. *Iconco*, 622 F.2d at 1295 (quoting *In re Estate of Stratman*, 1 N.W.2d at 642). Qwest asserts that the minuscule charges (i.e., 1/4 cent per minute) received by Qwest from the CMRS providers was solely to compensate Qwest for the use of its network and did not cover the far higher charges that INS (1 and 1/4 cpm) and its ILEC owners (8-9 cpm) seek for the use of their networks.

discussing INS' unjust enrichment claim, the Eight Circuit provided the following guidance:

> Unjust enrichment is an equitable doctrine of restitution, wherein a plaintiff 'must prove the defendant received a benefit that in equity belongs to the plaintiff.' *Slade v. M.L.E. Inv. Co.*, 566 N.W.2d 503, 506 (Iowa 1997). The doctrine is based on the concept of an implied contract. However, '[a]n express contract and an implied contract cannot coexist with respect to the same subject matter,' and Iowa courts refuse to imply a contract where an express contract exists. *Chariton Feed & Grain, Inc. v. Harder.*, 369 N.W.2d 777, 791 (Iowa 1985) (rejecting claim for unjust enrichment where the controversy was covered by an express contract). *Thus, to the extent that the basis for INS's claim of unjust enrichment is covered by an express contract, either in the form of a tariff or a reciprocal compensation arrangement, INS cannot state a claim for unjust enrichment under Iowa law.*

Id. at 694 (emphasis added) (holding also that "the proper treatment of the claim depends on the disposition of INS' other claims"). Thus, INS' unjust enrichment claim necessarily depends on resolution of the reciprocal compensation and tariff issues discussed by the Court above.[89] Accordingly, if the Court had found INS' tariffs valid and applicable, the unjust enrichment claim must be dismissed

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[89] INS acknowledges this, and states that if the Court determines INS' tariffs do not apply, INS seeks compensation through an unjust enrichment claim as "[i]t is not equitable for INS to provide a valuable service to Qwest, but not have the ability to be paid for that service."

regardless of whether there remain issues of fact as to the elements of such a claim.

The Court finds, however, that even though the tariffs were determined to not be applicable, INS' unjust enrichment claim as currently stated fails as a matter of law. First, the Court has determined the Board's actions with regard to directing negotiation/ arbitration is consistent with federal law and is available to INS. As a result, there is regulatory scheme in place to resolve the issues presented here.[90] Under that framework, INS will be compensated for the traffic it transported over its lines and delivered to end-user customers.

In addition, the Court has also determined that the IUB has validly determined Qwest is not obligated to pay access charges, the compensation being sought. To the extent Qwest might ultimately be required to make some payment to INS after negotiation/arbitration, the amounts cannot now be reasonably determined as neither the Court nor the parties can anticipate the involvement of the wireless carriers. In short, because resort to equity is improper where there is a regulatory scheme, INS' unjust enrichment claim is not the proper vehicle for resolution of these issues.

Moreover, the Court finds the Board's determination that Qwest did not receive a benefit belonging to INS is directly in line with federal law and so should be upheld. On the current record, there is no adequate showing that Qwest has retained money that belongs to INS, rather than just charging wireless carriers for access to the Qwest system. At the least, this

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[90] That framework is the section 252 negotiation/arbitration schema as implemented by the FCC and properly employed by the IUB in its decisions.

question is not ripe for consideration until the applicable regulatory process is allowed to proceed. Accordingly, the Court must dismiss the unjust enrichment claim asserted by INS.

H. Implied Contract/quantum Meruit Claim

While INS' claim for breach of implied contract/quantum meruit relies on many of the same facts as its claims for unjust enrichment, these claims are entirely separate theories of recovery under Iowa law. *See Order on Pending Motions*, at 12 (citing *Iowa Waste Sys., Inc. v. Buchanan County*, 617 N.W.2d 23, 29-31 (Iowa 2000) (distinguishing unjust enrichment and quantum meruit claims and stating that "despite the years of inseparably connecting these two terms, the two terms are not only markedly different, but not even rooted in the same legal genre"). INS argues that the court should allow INS' quantum meruit claim to proceed because there exist genuine issues of material fact on this issue.

Under Iowa law, a plaintiff claiming the existence of an implied contract must show the following: (1) plaintiff performed under circumstances reasonably indicating the performance was for the benefit of defendant and not another person; (2) plaintiff performed under circumstances reasonably indicating payment was expected; and (3) the services provided by the plaintiff were beneficial to the defendant. *Scott v. Grinnell Mut. Reinsurance Co.*, 653 N.W.2d 556, 562 (Iowa 2002); *Iowa Waste Sys., Inc.*, 617 N.W.2d at 28. INS argues that a reasonable trier of fact could find all three elements have been met in the present case. Qwest, on the other hand, contends that summary judgment should be granted on this count as INS is unable to show these elements have been satisfied for at least two reasons.

INS contends the first element is satisfied because INS performed under circumstances based on the terms of its tariffs indicating the services were provided for Qwest. A tariff functions as an offer to sell service on the terms specified in the tariff. *Metro E. Ctr. for Conditioning & Health v. Qwest Communications Int'l. Inc.*, 294 F.3d 924, 926 (7th Cir. 2000); *Advamtel, LLC v. Sprint Communications Co.*, 105 F. Supp. 2d 476, 479 (E.D. Va. 2000). According to INS, its tariff makes the carrier directly interconnecting with INS at a point of demarcation the customer responsible for payment.[91] INS maintains that carrier is Qwest.

INS argues that after April 1999, Qwest accepted INS' offer to sell service on the terms specified in the tariffs by constructively ordering service[92] and routing commingled calls to INS' networks. INS further contends Qwest expressly accepted INS' offer by submitting written ASRs requesting

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[91] The tariff does provide an exception if the calls are wireless-originated and the directly interconnecting carrier promptly provides information requested by INS to permit INS to accurately bill the original wireless carriers.

[92] The constructive order doctrine provides that where a party (1) maintains its interconnection to a carrier, (2) fails to take reasonable steps to stop using the services of the carriers, and (3) actually receives the services of the carrier, the party receiving the services is deemed to have ordered them. *See AT&T Communications of the Midwest, Inc. v. Iowa Utils. Bd.*, 687 N.W.2d at 561 (citing *Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 684-87); *AT&T Corp. v. FCC*, 292 F.3d 808, 812, 352 U.S. App. D.C. 104. INS maintains that Qwest satisfies all of the elements of the constructive order doctrine and thus is deemed to have ordered the services from INS for th transport of calls, whether they were wireline-originated or wireless-originated.

service. Additionally, INS asserts that Qwest has continued to send commingled traffic to INS' networks, fully aware INS is not technically able to distinguish between the type of call (i.e., wireless- or wireline-originated calls) or from where the calls originated (i.e., by Qwest's end users or end users of third-party carriers), and therefore, INS could not refuse to provide service to this traffic. INS argues that each of these actions by Qwest acted as an acceptance of INS offer to sell the service on the terms specified in the tariffs, and that Qwest reasonably should have understood that INS' provision of that service was for Qwest's benefit.

INS further argues that the circumstances surrounding the parties' relationship indicate the services provided were for Qwest's benefit, and not for the benefit of another person. For Qwest to fulfill its obligations to third-party carriers to transport calls to their ultimate destination, Qwest needed to engage INS' services to route such calls to the appropriate Routing Exchange Carrier ("REC") for termination. INS routes the calls to the appropriate REC, thereby enabling Qwest to fulfill its obligations and then bill and receive payment from the third-party carriers. INS compares the relationship between Qwest and INS to that of a contractor-subcontractor, where the contractor (Qwest) has hired the subcontractor (INS) to enable the contractor to fulfill its contractual obligations. *See K&L Landscape & Constr. Inc. v. Dakota Contractors, Inc.*, 2004 Iowa App. LEXIS 1151 (Iowa Ct. App. 2004). Under such a relationship, the performance of the subcontractor is principally for the benefit of the contractor.

INS next argues that the second element of an implied contract claim is satisfied because INS provided access service to Qwest under circumstances indicating that INS

expected payment.[93] The tariff and its terms, which INS argues Qwest assented to both expressly and constructively, was a mater of public record, and in fact, Qwest was aware of the relevant terms of the tariff. According to INS, the plain language of the tariff provides that Qwest is responsible for payment of wireless-originated calls if it does not provide information necessary for INS to bill the wireless carriers. In addition, INS has consistently invoiced Qwest for all traffic sent to INS, regardless of whether those calls were originated by third-party carriers, and has continued this practice even after Qwest's decision in April 1999 to stop paying for such calls.

Finally, INS contends Qwest cannot deny it received a benefit, thereby meeting the third element of an implied contract. According to INS, Qwest received service from INS that, if it were of no benefit, Qwest could have stopped using at any time. Logically, by not discontinuing use of INS' services, Qwest recognized the benefits it was receiving. The continued use of INS' services allowed Qwest to continue to make money for itself by selling its own services to third-party carriers.

In addition, under quantum meruit/implied contract, the measure of damages is the reasonable and customary value of the services provided. *Scott*, 653 N.W.2d at 562 (citing *Iowa Waste Sys., Inc.*, 617 N.W.2d at 29). This is not limited to the direct monetary gain of the defendant in the transaction. *Id.* In this case, INS asserts the reasonable and customary

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[93] Including payment for services provided after April 1999, when Qwest determined it was not required to make payments to INS and discontinued making any payments for use of INS' networks.

value of the services provided by INS to Qwest is easily determined by the published tariff rates. On this basis, INS urges the Court to discard Qwest's attempt to minimize the value of the benefit provided by INS by pointing to the small rates Qwest charges the third-party carriers.

Qwest first contends that its April 1999 letter to INS forecloses any finding that there existed an implied-in-fact contract for Qwest to pay for INS' transport of transit traffic. Quantum meruit, or implied contract, is "grounded in the realm of pure contract." *Iowa Waste Sys., Inc.*, 617 N.W.2d at 29. Like any contract, it requires "some overt communication of assent" by the party sought to be charged with the obligation. *Id.*, *see also Cooper v. Lakewood Eng'g & Mfg. Co.*, 45 F.3d 243, 246 (8th Cir. 1996) (stating that "like other contracts, an [implied contract] requires a 'meeting of the minds'"). In contrast to an express contract, the assent required to support an implied contract is inferred from "expressions other than words", that is, conduct. *Iowa Waste Sys., Inc.*, 617 N.W.2d at 29. Accordingly, there can be no implied contract where the party sought to be charged expressly denies, prior to performance by the other party, that such performance would give rise to some obligation on its part. *Id.*

Qwest maintains that this proposition is fatal to INS' claim. It is undisputed that Qwest expressly advised INS in April 1999 that Qwest did not assent to pay for the transport by INS of calls placed by subscribers of third-party carriers. Qwest asserts that "[s]uch a declaration of dissent flies squarely in the face if an implied-in-fact contract for provided services." *Id.* at 30. In addition, Qwest contends that INS' argument that it did not perform its services "gratuitously" misses the point that Qwest did not and should not have understood INS was entitled to compensation from Qwest for

calls placed by subscribers of other carriers, especially after Qwest's declaration to the contrary.

Qwest next argues that INS cannot establish that Qwest understood or should have reasonably understood that the transport of transit traffic was performed for and was beneficial to Qwest as opposed to the wireless carriers. To prevail, INS must establish that Qwest, the alleged recipient of transport provided by INS, should have understood that INS' transport of calls placed by subscribers of third-party wireless carriers was performed for and beneficial to Qwest. *See id.* Qwest contends that any finding to this effect is foreclosed for the following:

> (1) the amount of compensation received by Qwest from the wireless carriers (i.e., 1/4 cent per minute) relative to the amount of compensation demanded from Qwest by INS (i.e., 1.14 cents per minute) for the same calls;
>
> (2) the provisions in the agreements between Qwest and the wireless carriers pursuant to which the latter acknowledged that Qwest was not responsible for transport by INS or any other carrier, and that the wireless carriers were responsible for any compensation owed to INS for the transport of calls placed by their subscribers;
>
> (3) the conspicuous absence of disagreement by AT&T Wireless, Verizon Wireless, Sprint or any other wireless carriers participating in the Board's proceeding that they, not Qwest, were responsible for any compensation owed to INS;

(4) the Board's determination that the wireless carriers, not Qwest, had used INS' facilities, and that they, not Qwest, should compensate INS;[94] and

(5) agreements negotiated by INS with wireless carriers subsequent to the Board's proceeding.

Qwest contends that this Court has already held that the "true beneficiaries of INS' service" are the Independent LEC's (INS' owners) and their customers and the wireless carriers and their customers, as the Independent LEC's customers can receive wireless calls made by customers of the third-party wireless carriers. *INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at *15-16. Qwest asserts that finding is wholly unaffected by the Eighth Circuit's decision on appeal, *INS v. Qwest II*, 363 F.3d at 694, and that it requires the entry of summary judgment in Qwest's favor.

In addition, Qwest argues that the FCC decisions on intercarrier compensation generally, and transiting in particular, confirm the parties could not have reasonably understood that INS' transport in this case was performed for and beneficial to Qwest rather than the third-party wireless carriers that originated the calls. According to Qwest, the FCC's intercarrier compensation policy and rules "require the *calling party's carrier,* whether LEC, IXC or CMRS, to compensate the called party's carrier for terminating the call." *See Intercarrier Compensation NPRM*, at ¶ 9 (emphasis added).[95] Such "interconnection regimes," referred to in the

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[94] *IUB Order Affirming Proposed Decision*, at 2.

[95] INS attempts to distinguish the FCC's statements on the ground that they apply solely to termination of calls by its owners, the Iowa Independent LEC's, and not on INS. According to Qwest,

industry and by regulators as "calling party network pays", or CPNP, are "clearly the dominant form of interconnection regulation in the United States and abroad."[96] *Id.*

In *Texcom Inc. v. Bell Atlantic Corp.*, the FCC specifically applied CPNP to situations where the transit carrier has no relationship with the end-user customers placing or receiving the calls, holding the such transit carriers should not bear the burden of transporting traffic between third-party CMRS providers and LECs. *Texcom Order*, at ¶ 6. The FCC stated in relevant part,

> Currently, our rules in this area follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic, and ultimately their customers. Thus, through reciprocal compensation payments, the cost of delivering LEC-originated traffic is borne by the persons responsible for those calls, the LEC's customers. As we stated in the *Local Competition Order*, '[t]he local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for

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this argument is flawed because INS ignores the CPNP ("calling party network pays") and its underlying cost causation principles require focus not on the obligee (i.e., the carrier entitled to compensation), but on the obligor (i.e., the carrier which must pay compensation).

[96] The form of interconnection regulation other than CPNP, "bill and keep", means that interconnected carriers seek all monetary compensation form their end-user customers and forego compensating one another for their transport of calls placed between those customers. *See* 47 U.S.C. § 252(d)(2)(B)(i); *Intercarrier Compensation NPRM*, at ¶ 9.

> completing the call.' . . . In the case of third-party originated traffic, however, the only relationship between the LEC's customers and the call is the fact that the call traverses the LEC's network on its way to the terminating carrier. Where the LEC's customers do not generate the traffic at issue, those customers should not bear the cost of delivering that traffic from a CLEC's network to that of a CMRS carrier like Answer Indiana. Thus, the originating third-party carrier's customers pay for the cost of delivering their calls to the LEC, while the terminating CMRS carrier's customers pay for the cost of transporting that traffic from the LEC's network to their network.

Id. In addition, the FCC's Wireless Competition Bureau applied these principles to reject the claim that local calls placed by subscribers of third-party carriers should be treated as the transit carrier's "own" traffic and that the transit carrier should be required to compensate the carrier to which it delivers the third-party traffic. *Verizon Virginia Order*, at ¶ 541. The Bureau determined that the carrier to which the transiting carrier delivered the traffic should bill the originating carrier directly. *Id.* at ¶ 544.

Qwest also asserts that every federal court and state commission to consider the issue has held that Qwest, as a transit carrier, is not liable for "access charges" or other compensation "on [third-party] CMRS traffic that both originates and terminated in the same MTA" and transits Qwest's facilities. *See, e.g., 3 Rivers Tel. Coop. v. U.S. West*, 2003 U.S. Dist. LEXIS 24871, at *68-69 (D. Mt. 2003) (rejecting monetary compensation under tariff and unjust enrichment claims); *accord. Union Tel. Co. v. Qwest Corp.*, slip op., No. 02 CV 209B, at 26, 34 (D. Wyo. May 11, 2004) (same). Qwest maintains that this holding is

especially cogent in the present matter as the Board found "the vast majority of traffic at issue" is intraMTA, *IUB Proposed Decision*, at 21, and the FCC has defined intraMTA wireless originated traffic as local traffic. *See INS v. Qwest I*, 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, at *3.

Finally, Qwest contends that the "constructive order" cases cited by INS actually undermine INS' argument that Qwest was a party to an implied contract to pay 1.14 cents per minute or some other amount for INS' transport of calls placed by subscribers of third-party wireless carriers.[97] In the cases cited by INS, the defendant carrier found liable under the constructive order doctrine was an IXC (i.e., long distance carrier) that provided end-to-end service to, and had a billing relationship with the callers. *See Advamtel, LLC*, 118 F. Supp. 2d at 681, 682; *Advamtel LLC v. Sprint Communications Co.*, 105 F. Supp. 2d 476, 478, 479 (E.D. Va. 2000); Final Decision and Order, *Fiber-comm, L.L.C. et. al. v. AT&T Communications of the Midwest Inc.*, Docket No. FCU-00-3, at 10, 29 (Iowa Utils. Bd. Oct. 25, 2001), *aff'd, AT&T Communications of the Midwest, Inc. v. Iowa Utils. Bd.*, 2004 WL 2049658 (Iowa Sept. 15, 2004).

In stark contrast, Qwest asserts in the present case that it was "merely an intermediary", *INS v. Qwest II*, 363 F.3d at 694 n.3, providing "an indirect connection for local traffic." *IUB Proposed Decision*, at 13. Qwest had no billing relationship with the callers, nor did it provide the callers or their wireless carriers with an end-to-end service that included

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[97] Though not relevant to this motion, Qwest sharply disputes that the "reasonable value" of INS' transport of the calls at issue should be measured by INS' unilaterally filed tariffs, especially considering the vast majority of calls at issue are local.

transport by INS and/or termination by the Iowa Independent LEC's. *See id.* Additionally, in contrast to INS' cited cases where no party even claimed the plaintiffs had recourse against other carriers, here INS is entitled to compensation from the wireless carriers.

In reply, INS contends Qwest's self-serving April 1999 letter does not excuse it from liability for its later action in actually using INS' service, an outcome rejected by the FCC. *See MGC Communications v. AT&T*, 14 FCC Rcd. 11647 (1999). Despite its letter, Qwest continued to use INS' services in the transport of wireless calls.

In *MGC Communications*, the defendant purchased services provided by the plaintiff pursuant to its federal tariff. *Id.* The defendant later wrote a letter to the plaintiff for the purpose of terminating their arrangement for originating access service, and the defendant subsequently stopped paying for such service. *Id.* Despite this, the FCC ruled the defendant was liable to the plaintiff for access services because the defendant had not taken sufficient steps to terminate its access service arrangement with the plaintiff. *Id.* After writing the letter, the defendant continued to accept new subscribers from the plaintiff and did not migrate customers to another carrier. *Id.*

INS maintains Qwest placed Access Service Requests ("ASR's") for INS' services while knowing the INS trunks being used by Qwest are designed to carry only long distance calls and that INS expected payment for Qwest's use of the network and continued to bill Qwest for such use. Qwest was aware INS could not distinguish between wireless and wireline-originated calls in the commingled traffic, or whether the calls came from Qwest's customers or from the customers

of some third-party. As a result, INS was unable to refuse to provide service for the calls which Qwest refused to pay.

Moreover, Qwest refused to implement INS' suggestion that Qwest send calls from wireless carriers to INS over separate dedicated trunks, failed to provide information INS requests to facilitate billing originating wireless carriers, and attempted to charge INS for the records it did belatedly provide.[98] In short, Qwest acted voluntarily in continuing to place calls on INS' network. *See INS v. Qwest II*, 363 F.3d at 694 n.3. INS asserts that Qwest's continued use of INS' services constitutes the assent necessary for quantum meruit and "speak louder" than the April 1999 letter, and that Qwest should be held liable for this affirmative action. *See Roger's Backhoe Serv. v. Nichols*, 681 N.W.2d 647, 651 (Iowa 2004).

INS further counters Qwest's arguments by asserting that its contracts with third parties cannot insulate Qwest from liability. Specifically, INS maintains that it was not a party to Qwest's agreements with any third-party wireless carrier, and that Qwest cannot through a contract with a third party allocate responsibility for paying INS without INS' consent, nor can these parties agree who is receiving the benefit of INS' services.[99]

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[98] INS further notes that the wireless carriers have questioned the accuracy of the records provided by Qwest.

[99] In a footnote, INS posits that "[h]ad the 8th Circuit agreed that Qwest received no benefit as a matter of law, it would not have reinstated the unjust enrichment count, of which benefit is an element." This is an overly generous use of the finding of the Circuit, which while reinstating the unjust enrichment count, did not reach the specific holding INS argues. Instead, the Circuit left the issue open "as the proper treatment of the claim depends on the

INS further contends that the CPNP regime referenced by Qwest, wherein transiting carriers are exempt from paying for services of other carriers in the calling path, does not protect Qwest from liability as no such regulatory scheme exists. INS points out that the FCC proceeding cited by Qwest in support of CPNP is merely a proposal for rulemaking and not a final implementing order, *see Intercarrier Compensation NPRM*, at ¶ 38, and that existing rules do not require CPNP. *See In the Matter of Access Charge Reform. Eighth Report and Order*, 19 FCC Rcd. 9108, at ¶ 18 (2004).

Indeed, the FCC's Wireline Communication Bureaus ordered a transiting carrier, rather than the calling party's carrier, to pay access charges to a terminating carrier where the transiting carrier failed to pass on available information that would allow the terminating carrier to bill the originating carriers.[100] *Cavalier*, 18 FCC Rcd. 25887. In addition, a sister district court recently rejected Qwest's CPNP argument because of tariff language that made the party directly delivering the calls liable and the historic practice under which Qwest for many years paid for all the calls it delivered, regardless of origin. *See 3 Rivers Tel Coop., Inc. v. U.S. West Communications, Inc.*, 2003 U.S. Dist. LEXIS 24871, *19, *41-43 (D. Mont. 2003).[101] Finally, INS asserts that the

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disposition of INS's other claims." *INS v. Qwest II*, 363 F.3d at 695.

[100] Recently several wireless carriers have agreed to directly connect with INS without Qwest's involvement, thereby solving on a going forward basis the billing/ measurement problems posed by Qwest's commingling of calls.

[101] *3 Rivers* involved terminating carriers relying on a *state* tariff that the court found was preempted, a situation not present in

reciprocal compensation cases cited by Qwest do not support Qwest's CPNP argument because reciprocal compensation only applies to local calls, not long distance or interexchange calls, and that reciprocal compensation does not govern transiting charges. *See Texcom Reconsideration Order*, at ¶ 4; *see also* 47 C.F.R. 51.701(e) (providing that the terminating carrier bills the originating carrier in a reciprocal compensation arrangement).

The Court finds that INS' implied contract/quantum meruit claim fails for many of the same reasons its unjust enrichment claim fails. Foremost, an equitable remedy is unavailable where there is a regulatory scheme in place such as that present here. Additionally, INS has not made an adequate showing on the current record that the elements of an implied contract were met.

Moreover, the Board determined that Qwest was not liable for access charges for its transport and delivery of the calls to INS and this holding has been found by the Court to be consistent with federal law. Thus, INS cannot be granted compensation already determined unavailable through resort to a claim of implied contract. Finally, once Qwest wrote and delivered the April 1999 letter laying out its determination it no longer was required to pay INS, then Qwest could not be found to be performing under the expectation that it would be required to pay INS and INS could not be expected to reasonably believe payment would be forthcoming. Also, since the Court has determined there is no applicable tariff, INS cannot use the terms of the tariff to demonstrate it was acting with the reasonable expectation of receiving payment.

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this case as preemption is inapplicable to the *federal* tariff at issue here.

In so finding, the Court again notes there may be underlying issues that are simply not ripe for consideration.

CONCLUSION

For the foregoing reasons, the Court resolves the issues presented in the parties' initial briefs and hereby **grants** Qwest's motion for summary judgment (Clerk's Nos. 50, 54). The Court finds the IUB had jurisdiction to rule in the underlying action and was acting within its authority in rendering its rulings. The Court further finds the determinations made by the IUB in its rulings are consistent with, and do not violate, federal law. As a result, the Court holds the Board's orders must be upheld as a regulatory means of resolving the dispute.

The Court next finds INS' Amended Federal Tariff does not apply to the traffic at issue as it undermines the thrust of the Act and the authority of the IUB. Additionally, the Court finds the Iowa tariff and the original federal tariff inapplicable under the terms of the 1996 Act and the Board's rulings. These determinations also necessarily foreclose Defendant's self-help claim.

Having made these findings, the Court must also hold that the equitable remedies do not lie. The Court finds that a regulatory scheme is available to the parties as indicated by the Board's decisions, and the parties must adhere to this framework before equitable remedies may be ripe for consideration. In addition, the unjust enrichment and implied contract/quantum meruit claims fail on the current record for assorted substantive deficiencies as discussed above.

Qwest's motion for summary judgment (Clerk's Nos. 50, 54) must be **granted.** The case is dismissed, and the Clerk of

Court is directed to enter Judgment in favor of the Defendant and against the Plaintiff.

IT IS SO ORDERED.

Dated this 17th day of August, 2005.

/s/
JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-3843

[Filed April 7, 2004]

Iowa Network Services, Inc., Appellant,	)
v.	)
Qwest Corporation, Appellee.	)

Before BYE, HANSEN, and MELLOY, Circuit Judges.

OPINION

HANSEN, Circuit Judge.

Iowa Network Services, Inc. (INS) brought suit against Qwest Corporation (Qwest) in federal district court seeking to collect amounts allegedly due under INS's federal and state telecommunications tariffs for services INS provided in connecting wireless calls to rural Iowa local telephone companies. The district court dismissed the action as precluded by the Iowa Utility Board's prior decision that INS's tariffs did not apply to the services provided. INS

appeals the dismissal, and we reverse and remand for further proceedings.

I.

Individual telephone companies provide local telephone service or "telephone exchange service" to customers within the telephone company's local exchange area. A number of small independently owned telephone companies provide much of the local telephone exchange service to the residents of Iowa. Each company serves a well-defined localized geographic area, and the companies are referred to as local exchange carriers or LECs. *See* 47 U.S.C. § 153(26) (defining "LEC"). Qwest, providing both local and long-distance telephone service in Iowa and fourteen other states, is also a LEC to the extent that it supplies local telephone service in many Iowa communities. LECs typically own the wires, computer switches, and related facilities needed to provide telephone service to their customers. In 1987, nearly 150 of the small, independently-owned LECs in Iowa joined together and formed INS. Membership in INS allows each independent LEC to utilize INS's expanded centralized network as its own. Qwest is not a member of INS.

Even after the 1980s breakup of the AT&T telecommunications monopoly, which, inter alia, divested AT&T of its local exchange carriers, local telephone service continued to be viewed and operated as a natural monopoly, with state utility boards, or commissions, giving one local telephone service provider exclusive coverage of a given geographic area. The Telecommunications Act of 1996 (1996 Act), 47 U.S.C. §§ 151-615b, fundamentally restructured local telephone markets and the regulatory scheme that governed them. No longer could states enforce laws that impeded competition in the local markets. No longer was the

local market to be viewed as a natural monopoly with only one authorized provider of local telephone service. To the contrary, the 1996 Act required local exchange carriers to facilitate local competition by sharing their networks with their new competitors. The 1996 Act also thrust the federal government into the local telephone market regulatory arena, which had previously been the exclusive domain of the states. *MCI Telecomm. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 497 (3d Cir. 2001) ("The Act requires that local service, which was previously operated as a monopoly overseen by the several states, be opened to competition according to standards established by federal law."), *cert. denied*, 537 U.S. 941, 123 S. Ct. 340, 154 L. Ed. 2d 247 (2002). The new relationship between the federal government (through the Federal Communications Commission (FCC)), the federal courts, and the state commissions in regulating local telephone markets and the competing providers of telephone services in those markets is at the heart of this case.

As relevant to this case, there are two types of charges which one carrier can extract from another for the provision of telecommunication services. The first deals with local telephone service. As noted above, one of the primary purposes of the 1996 Act was to promote competition in the local telephone service market. To facilitate that purpose, the Act requires incumbent LECs[1] (ILECs) to interconnect with another carrier providing local telephone service to a person within the ILEC's local exchange. *See* 47 U.S.C. § 251(c)(2) (providing that each ILEC has "the duty to provide, for the facilities and equipment of any requesting telecommunications

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[1] An incumbent LEC is the LEC that was in existence and providing local exchange service to a given area on the effective date of the 1996 Act, February 8, 1996. 47 U.S.C. § 251(h).

carrier, interconnection with the [LEC's] network for the transmission and routing of telephone exchange service and exchange access" with quality at least equal to that provided the ILEC's own customers and at reasonable rates and conditions). Without the interconnection requirement, a competing new LEC would not be able to connect its customers to a customer served by the ILEC without building its own infrastructure to serve both customers. Under the 1996 Act, the amount an ILEC can charge for allowing a competitor to use its infrastructure to deliver a local call is to be determined by an interconnection agreement negotiated (or imposed by arbitration) between the ILEC and the interconnecting carrier that has been approved by the state commission. *See* 47 U.S.C. §§ 251(c)(1); 252(e).

The second type of charge is the access fee charged by common carriers for use in carrying long-distance telecommunications via their infrastructure, or toll services. *See* 47 U.S.C. §§ 201 (requiring common carriers engaged in interstate communication to furnish communication service upon request, to establish physical connections with other carriers, and to establish through routes), 202 (prohibiting discrimination related to the use of common carrier lines of communication). A common carrier must file with the FCC a schedule of all of its charges for interstate wire and radio communication using its network before it may charge its customers for the service. *See* 47 U.S.C. § 203(a). This schedule is the carrier's federal tariff. Carriers file similar tariffs with the applicable state commission for long-distance charges related to intrastate communications.

This dispute arises from the growing use of wireless telecommunications (commonly referred to as cell phone or mobile phone services). Commercial Mobile Radio Service (CMRS) providers offer radio communication services

between land stations and mobile receivers. *See* 47 C.F.R. § 20.3. Traditional notions of "local exchange areas" do not fit neatly into this new world of wireless communications. For wireless communications, the country is divided into Major Trading Areas (MTAs) rather than local exchange areas. Thus, the local calling area for a cell phone user is determined by the cell phone user's MTA. *See* 47 C.F.R. § 51.701(b)(2). The MTA for Iowa is the Des Moines MTA, which encompasses virtually all of Iowa and small portions of its neighboring states. IntraMTA traffic originates and terminates within the same MTA, while interMTA traffic originates in one MTA and terminates in another.[2] We are concerned in this case with the charges applicable to intraMTA traffic.

This case involves traffic which occurs when a cell phone user located within the Des Moines MTA initiates a call to a land-line customer of one of the Iowa independent LECs, and the cell phone user's CMRS provider uses Qwest's network to transport the call to INS's network for final termination on the LEC's infrastructure to the called party. Between the 1980s and 1999, Qwest paid INS the access charges established by INS's relevant tariffs for INS's services in transporting the calls that Qwest received from a CMRS provider and handed off to INS for delivery to and termination at an independent ILEC customer via INS's network. Qwest also paid termination fees to the ILEC pursuant to the independent ILECs' tariffs. Three years after passage of the 1996 Act, however, Qwest took the new position that wireless calls originating and terminating within

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[2] The determination of whether a call is interMTA or intraMTA is made when the call is first connected, although a wireless user may travel into another MTA during the duration of the call.

the Des Moines MTA were local rather than long-distance calls, and thus were not subject to the tariffed access charges imposed by either INS or the terminating ILEC. Rather, according to Qwest, INS had to look to the CMRS provider for payment pursuant to a reciprocal compensation arrangement as required by the 1996 Act. *See* 47 U.S.C. § 251(b)(5).

For its new position, Qwest relied upon an order issued by the FCC. Pursuant to the 1996 Act's requirements, the FCC issued its First Report and Order implementing the Act's local competition provisions. *See* In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd. 15499 (1996) (hereinafter "First Report and Order"). The order was in response to the 1996 Act's direction to the FCC to "'establish regulations to implement the requirements' of § 251, that is, the requirements to advance local competition." *GTE South, Inc. v. Morrison*, 199 F.3d 733, 737 (4th Cir. 1999) (quoting 47 U.S.C. § 251(d)(1)). The order specifically addressed the billing of calls originated by a wireless provider and delivered to a LEC within the same MTA. First Report and Order at 16013-019, ¶¶ 1035-1045. The FCC decreed that "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5) [requiring LECs to establish reciprocal compensation arrangements], rather than interstate and intrastate access charges." *Id.* at ¶ 1036. The FCC also found that "the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic." *Id.* ¶ 1034. "Interexchange traffic" is a term of art which correlates to what consumers would

traditionally consider to be "long-distance" telephone service for which "toll charges" are incurred; an interexchange carrier (IXC) is a long-distance carrier who provides intrastate or interstate long-distance communications services between local exchange areas. Qwest argued that paragraph 1036 of the First Report and Order controlled, precluding INS from charging access charges for the relevant traffic. INS countered that paragraph 1034 governed, based on the premises that Qwest is an IXC, the traffic is interexchange traffic, and Qwest was using trunk lines it had designated for long-distance traffic to handle the CMRS originated calls.

Unable to come to an agreement on how to treat the traffic, in September 1999, Qwest stopped paying for access charges billed by INS (dating back to April 1999) that Qwest determined were related to intraMTA wireless-originated calls and sought a declaratory order from the Iowa Utilities Board (IUB or "the Board") that Qwest was not liable for such access charges. The IUB determined that factual disputes and the complexity of the issues regarding the proper treatment of the transported traffic at issue precluded issuance of the requested order and docketed the matter as a contested case, allowing INS to intervene. In the contested case, Qwest, in addition to the declaratory order, sought a refund of access charges it had paid to INS for the 24-month period prior to April 1999. INS in turn sought payment of the access charges Qwest had refused to pay from April 1999 through the time of the hearing.

The IUB held extensive hearings, including technical workshops, to better understand the parties' claims. The presiding officer entered a proposed decision and order in which she determined that the traffic at issue was local traffic pursuant to the First Report and Order paragraph 1036, and ruled that the access tariffs did not apply. The IUB rejected

INS's reliance on paragraph 1034. The IUB determined that the FCC's reference to an IXC was to a traditional IXC that had an established billing relationship with either the originating caller or the end-user, whom the IXC could bill. Because Qwest did not have such a relationship with either the calling or the called parties in the traffic at issue, Qwest was not an IXC. The IUB determined that Qwest provided an indirect connection, not toll services. The presiding officer determined that the CMRS providers and the LECs should negotiate and enter an interconnection agreement, including a reciprocal compensation arrangement, related to the traffic. The presiding officer stated that the parties should operate on a billand-keep basis pursuant to regulation, at least until an imbalance could be shown justifying charges for the traffic. "Bill-and-keep arrangements are those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network," 47 C.F.R. § 51.713(a), and are appropriate when "the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction," *id.* § 51.713(b).

The presiding officer denied Qwest's request for a refund for the prior 24 months because she found that the parties had agreed to use the rates previously charged by INS, at least until the time that Qwest formally disputed them as of April 1999. She further determined that if the CMRS providers wanted to exchange traffic with the LECs, they should enter an interconnection agreement with the LECs, and that if the CMRS providers wished to use INS's facilities to indirectly connect with the LECs, then INS was entitled to compensation for its indirect transport services and should be included in the negotiations for the agreement. The presiding officer determined that the terms of the interconnection

agreement should apply prospectively from April 1999. Thus, while the IUB rejected INS's request for the payment of funds withheld by Qwest since April 1999, it did determine that INS was entitled to be compensated by the CMRS providers for the transport services Qwest refused to pay since April 1999 at the rate ultimately determined to apply to such traffic going forward.

INS appealed the presiding officer's proposed decision and order to the full Board, which affirmed, making the Board's action final. Instead of appealing the final IUB decision to the Iowa courts, *see* Iowa Code §§ 476.13, 17A.19, or bringing an action challenging the IUB's decision in federal court pursuant to the Act, INS brought this rather ordinary collection action in federal district court. INS brought claims based on alleged violations of its federal and state tariffs as well as an unjust enrichment claim. INS sought payment of charges billed and allegedly owed under both its federal and state tariffs for the time period beginning in April 1999, or alternatively, damages for the unjust enrichment received by Qwest in using INS's facilities without paying for them. The district court determined that the claims based on INS's tariffs had been decided by the IUB when it decided that the traffic was local and not subject to tariff charges, and consequently were barred by the doctrine of res judicata. It further determined that INS failed to state a claim for unjust enrichment. The district court granted Qwest's motion to dismiss, and INS appeals.

II. Res Judicata

We begin by focusing on the issue before us. The merits of INS's claims stemming from its tariffs are not before this court. We have before us only the district court's determination that INS's claims are precluded by the IUB's

decision. Because the relevant prior judgment was a state of Iowa administrative proceeding, we apply Iowa's res judicata or claim preclusion law. *See Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1014 (8th Cir. 2002) ("It is fundamental that the res judicata effect of the first forum's judgment is governed by the first forum's law, not by the law of the second forum." (internal quotation marks omitted)). Under Iowa law,

> a valid and final judgment on a claim precludes a second action on that claim or any part of it. The rule applies not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which could have been offered for that purpose.

Arnevik v. Univ. of Minn. Bd. of Regents, 642 N.W.2d 315, 319 (Iowa 2002) (internal citations omitted). Iowa courts look for three factors in applying the defense of claim preclusion: "[1] the parties in the first and second action were the same; [2] the claim in the second suit could have been fully and fairly adjudicated in the prior case; and [3] there was a final judgment on the merits in the first action." *Id.* (citing 50 C.J.S. Judgment §§ 702, 703 (1997)).

INS argues that the doctrine of claim preclusion does not apply because the first judgment was entered by a state administrative agency and was unreviewed in state court. Iowa courts follow the general rule that gives preclusive effect to adjudications by administrative agencies. *See Gardner v. Hartford Ins. Accident & Indem. Co.*, 659 N.W.2d 198, 207 (Iowa 2003). The Supreme Court of the United States has also allowed unreviewed state administrative decisions to be given preclusive effect, but only when doing so did not contradict congressional intent as to the interplay between federal court jurisdiction and state agency findings. *Univ. of Tenn. v.*

Elliott, 478 U.S. 788, 794-95, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986) (considering whether preclusive effect should be given to an unreviewed state agency's fact-finding with respect to Title VII case, even though 28 U.S.C. § 1738, requiring federal courts to give full faith and credit to state court judgments, does not apply to unreviewed state administrative findings). In the interpretation of a federal statute, the question of whether a state administrative agency's decision should be given preclusive effect is "not whether administrative estoppel is wise but whether it is intended by the legislature." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991). The Court held that the Age Discrimination in Employment Act's (ADEA) "filing requirements make clear that collateral estoppel is not to apply," *id.* at 110-11, where the ADEA requires a petitioner to exhaust state administrative remedies, if available, before seeking redress in federal court, *id.* at 111 (citing 29 U.S.C. § 633(b)). That scheme "plainly assumes the possibility of federal consideration after state agencies have finished theirs." *Id.*

The Court began with the premise that "where a common-law principle is well established, as are the rules of preclusion, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Id.* at 108 (internal quotation marks and citations omitted). Stated another way, "common law doctrines [of res judicata and issue preclusion] . . . are trumped by the Supremacy Clause if the effect of the state court judgment or decree [or administrative ruling] is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy." *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1219 (10th Cir.) (holding that FAA was not precluded from

reviewing ban imposed by airport authority for compliance with federal law even though state supreme court had previously upheld ban, where federal concerns were clearly preeminent in field of aviation regulation), *cert. denied*, 534 U.S. 1064, 122 S. Ct. 664, 151 L. Ed. 2d 578 (2001). Thus, the Astoria rule prevents application of res judicata in this case if Congress so intended within the context of the Telecommunications Act of 1996, 47 U.S.C. §§ 151-615b.

Our review of the 1996 Act convinces us that Congress intended to supplant the common law principles of claim preclusion when it enacted the 1996 Act, at least with respect to the issues here involved. It is worth repeating that the issue determined by the IUB was that the intraMTA traffic between the CMRS providers and wireline ILECs, using Qwest's and INS's transmission facilities, involved local traffic rather than long-distance toll service, and as such, reciprocal compensation under § 251(b)(5) rather than tariffed access charges applied to the traffic.

There can be no doubt that in the 1996 Act Congress greatly expanded the federal government's involvement in the telecommunications industry, even into areas such as local exchange service that previously had been left to state regulation. "Through the Telecommunications Act of 1996 Congress has opened the door to competing local exchange carriers and has inserted both the Federal Communications Commission (FCC) and the federal courts into the previously state-regulated monopoly." *Ill. Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 568 (7th Cir. 1999) (holding that § 252(e)(6) gave the federal court jurisdiction to review whether a state agency determination-that the parties' interconnection agreement intended to subject calls placed to internet service providers to reciprocal compensation-violated federal law), *cert. dismissed*, 535 U.S. 682, 122 S. Ct. 1780,

152 L. Ed. 2d 911, and *cert. denied*, 535 U.S. 1107, 122 S. Ct. 2318, 152 L. Ed. 2d 1071 (2002); *see also AT&T Corp. v. Iowa Until. Bd.*, 525 U.S. 366, 381 n.8, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999) ("Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control.").

Congress was well aware of the existing jurisdictional authority split between the federal government and state governments concerning various aspects of the telecommunications industry when it drafted the 1996 Act. For instance, the 1996 Act specifically retains a state commission's jurisdiction over local exchange service, even if a portion of that service includes interstate communication. *See* § 221(b) ("Nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service . . . in any case where such matters are subject to regulation by a State commission . . . ."). However, Congress expressly exempted the states' authority concerning local exchange service with respect to mobile services: "notwithstanding . . . § 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ." § 332(c)(3)(A).

In addition, Congress specifically delegated to federal district courts the task of reviewing state agency determinations made pursuant to § 252. *See* § 252(e)(6). The scheme developed by the 1996 Act requires all ILECs to interconnect with a requesting telecommunications carrier for the transmission of telephone exchange service and to enter an interconnection agreement, including the establishment of reciprocal compensation arrangements for the transport and

termination of communications. *See* § 251(b)-(c). Section 252 deals with the formation of the interconnection agreements, which may be reached by negotiation or arbitration. *See* § 252(a)-(b). Once reached, interconnection agreements must be approved by the relevant state commission. § 252(e)(1). If the state commission fails to act on the agreement, either approving or rejecting it, the FCC "shall assume the responsibility of the State commission." § 252(e)(5). If the state commission acts either to approve or reject an agreement, the aggrieved party may bring an action in an appropriate federal district court. § 252(e)(6). We have previously construed this provision to allow a federal district court to review a state commission's interpretation of an interconnection agreement, in addition to reviewing a state commission's approval or rejection of an agreement. *See Southwestern Bell Tel. Co. v. Connect Commun. Corp.*, 225 F.3d 942 (8th Cir. 2000). The Supreme Court declined to reach the issue of whether § 252(e)(6) specifically grants federal courts jurisdiction to review a state commission's interpretation of interconnection agreements, but held that in no event did the provision divest federal courts of their jurisdiction under the general federal question statute. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643-44, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002) (federal courts have jurisdiction under 28 U.S.C. § 1331 to review claim that state commission violated federal law in determining that interconnection agreement included calls placed to ISP providers as local calls subject to reciprocal arrangement, refusing to address issue of whether 47 U.S.C. § 252(e)(6) separately gave federal courts power to review state commissions' interpretation of interconnection agreement).

The IUB decision here did not involve the approval, rejection, or even the interpretation of an interconnection

agreement; none exists. Rather, it involved the IUB's determination that the traffic at issue-intraMTA traffic-is local traffic subject to a reciprocal compensation arrangement rather than toll service subject to access charges. The IUB recommended that the CMRS providers and the LECs enter an interconnection agreement, which agreement was to be premised on the IUB's determination that the traffic at issue was subject to reciprocal compensation. It further stated that if the CMRS providers intended to connect indirectly with the LECs through Qwest or INS, then they had to include those parties in the agreement. As to the parties to the interconnection agreement, assuming one is ever reached, the IUB's determination that the traffic at issue is subject to reciprocal compensation will eventually be reviewable within the context of any federal court § 252(e)(6) proceedings that may be instituted.

But the lack of an interconnection agreement reviewable pursuant to the federal courts' exclusive jurisdiction established by § 252(e)(6) does not give the IUB's determination in this case preclusive effect. To the contrary, consider the scenario that will exist if the CMRS providers do enter interconnection agreements with the independent LECs and include INS in the negotiations and agreement. Once the agreement is either approved or rejected by the IUB, any aggrieved party is directed by Congress to bring an action in federal court to challenge the IUB's determination that the agreement is, or is not, in compliance with §§ 251 and 252. Where does the IUB's original determination, at issue here, then come into play? Can it bind the federal district court's reviewing hands? It certainly should not have preclusive effect in that scenario, and we cannot see how it can have preclusive effect in the present litigation.

Federal courts have the ultimate power to interpret provisions of the 1996 Act, including whether § 251(b)(5)'s reciprocal compensation requirement applies to the wireless traffic at issue here, even though this case is not brought within the context of a § 252(e)(6) proceeding. *See GTE North, Inc. v. Strand*, 209 F.3d 909, 916-17 (6th Cir.), *cert. denied*, 531 U.S. 957, 121 S. Ct. 380, 148 L. Ed. 2d 293 (2000). In GTE North, during the pendency of a § 252(b) arbitration proceeding involving GTE as the ILEC, the Michigan Public Service Commission initiated state administrative proceedings against GTE and other ILECs to establish general terms of interconnection. Within that administrative proceeding, the state commission ordered GTE to publish tariffs in which GTE would offer to sell its network elements at rates predetermined by the state commission. GTE appealed that order, which was affirmed by the Michigan Court of Appeals. GTE then sued the state commission in federal court, alleging that the state commission violated federal law in ordering GTE to publish the tariff. The district court dismissed for lack of jurisdiction, finding that § 252(e)(6) precluded federal review until the state commission made a determination either approving or rejecting an interconnection agreement pursuant to § 252. The Sixth Circuit reversed, holding that the district court had jurisdiction under 28 U.S.C. § 1331 to review the state commission's order that was not part of a 47 U.S.C. § 252 interconnection proceeding. *Id.* at 915-16. To preclude federal court review of a non- § 252 order on the basis that the order would eventually make its way into a reviewable interconnection agreement would circumvent Congress's decision to establish federal procedures for negotiating interconnection rights and to concentrate final judicial review of interconnection agreements in federal courts. *Id.* at 918. The court held "that federal review is available under § 1331 to determine whether state commission orders violate federal

law except in cases in which the challenged regulatory action is clearly an interlocutory order arising out of § 252 proceedings." *Id.* at 919.

Here, the IUB was indisputably interpreting federal law. As noted by the Supreme Court, "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." AT&T Corp., 525 U.S. at 378 n.6. Given this regulatory landscape, we hold that the district court erred in giving preclusive effect to the IUB's determination that the traffic at issue here was subject to reciprocal compensation pursuant to § 251(b)(5).

The IUB proceedings involved more parties than are involved in this litigation. As stated above, Qwest filed a declaratory action, which the IUB converted into a contested case. Parties intervening in the contested case included INS, the Iowa Telecommunications Association (ITA), the Rural Iowa Independent Telephone Association (RIITA), four wireless providers, and two independent local exchange carriers. Following the IUB's decision, RIITA, an association of independent rural telephone companies, brought a federal action challenging the IUB's order that its members, the ILECs, were required to enter interconnection agreements with the CMRS providers and apply reciprocal compensation arrangements to the intraMTA traffic at issue. RIITA named the IUB and the individual board members as defendants in its federal district court case. Qwest was allowed to intervene in support of the IUB's decision. The district court dismissed the case for lack of jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(1), finding that RIITA's challenge was really to the final order entered by the FCC, and as such, original jurisdiction belonged in the United States Court of Appeals. In our companion case, *Rural Iowa Indep. Tel. Ass'n v. Iowa*

Utils. Bd., 362 F.3d 1027, 2004 U.S. App. LEXIS 6077, No. 02-4060, 2004 WL 635523 (8th Cir. Apr. 1, 2004), we reversed the district court and remanded the case back to the district court to decide the remaining issues. We held that RIITA's federal action did not in fact challenge the FCC's order, but rather the IUB's interpretation of it. 2004 U.S. App. LEXIS 6077 at *2.

The inconsistency that would result if we allowed the IUB's decision to have preclusive effect in this case while we remand the companion case for further consideration by the district court reinforces our decision that the IUB's decision should not be given preclusive effect in this case. Granted, the parties did not argue that the IUB's decision should be granted preclusive effect in the companion case, but the argument Qwest did make is equally telling. Qwest strenuously argued that the IUB's interpretation was governed, in fact controlled, by 47 U.S.C. § 251(b)(5) and the FCC's implementing regulations. (Qwest Br. at 26.) Congress gave the authority to interpret § 251(b)(5) to the federal courts. To hold that the district court was bound by the IUB's determination in this case, but allow the district court in the companion case to reach the federal issues, could result in an inconsistency we cannot condone.

We point out that our holding is narrow-it is limited to the district court's decision that it was bound by the IUB's determination on principles of res judicata. That is not to say that we think the IUB erred in interpreting federal law; we express no opinion there. Rather, we remand the case to the district court for further proceedings, as that court is best poised for evaluating the parties' remaining arguments.

III. Unjust Enrichment

The district court granted Qwest's motion to dismiss INS's unjust enrichment claim for failure to state a claim.

> We review de novo a district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations.

Krentz v. Robertson, 228 F.3d 897, 905 (8th Cir. 2000) (internal citations and quotation marks omitted).

The district court found, as a matter of law, that Qwest was not a beneficiary of INS's services because the traffic that passed along INS's network belonged to the wireless providers, not to Qwest. The district court based its conclusion on the IUB's determination that the traffic at issue was local and as such was not subject to access charges. (Add. at 33.) The district court determined that the only beneficiaries of INS's network were the CMRS providers and their customers who made the calls, and the ILECs and their customers who received the calls. (Add. at 35.)[3]

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[3] We respectfully believe that the district court misstated the law in stating that as an ILEC, Qwest was obligated to carry the CMRS traffic if requested to do so. (Add. at 32.) An ILEC is an incumbent local exchange carrier. Although Qwest serves as a LEC

Unjust enrichment is an equitable doctrine of restitution, wherein a plaintiff "must prove the defendant received a benefit that in equity belongs to the plaintiff." *Slade v. M.L.E. Inv. Co.*, 566 N.W.2d 503, 506 (Iowa 1997). The doctrine is based on the concept of an implied contract. However, "an express contract and an implied contract cannot coexist with respect to the same subject matter," and Iowa courts refuse to imply a contract where an express contract exists. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985) (rejecting claim for unjust enrichment where the controversy was covered by an express contract). Thus, to the extent that the basis for INS's claim of unjust enrichment is covered by an express contract, either in the form of a tariff or a reciprocal compensation arrangement, INS cannot state a claim for unjust enrichment under Iowa law.

As stated above, we are remanding this case to the district court to decide for itself whether the traffic at issue is subject to access charges pursuant to INS's tariffs. We likewise reverse and remand the district court's judgment dismissing the unjust enrichment claim and leave the issue open on remand, as the proper treatment of the claim depends on the disposition of INS's other claims.

---

in certain communities to the extent it provides local telephone service, and may even be an ILEC, a fact not developed on the record, it served neither function with respect to the traffic here at issue. The CMRS traffic was not directed to any of Qwest's local telephone customers; rather, Qwest served merely as an intermediary carrying the traffic on its route to INS's member companies' local telephone customers.

IV.

We reverse the district court's judgment and remand for further proceedings not inconsistent with this opinion.

APPENDIX E

UNITED STATES CONSTITUTION (ART. VI))
Cl 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

COMMUNICATIONS ACT (47 U.S.C. §§ 151, ET SEQ.)

§ 153. Definitions (47 U.S.C. § 153)

For the purposes of this Act, unless the context otherwise requires--

* * * *

(10) Common carrier. The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * *

(26) Local exchange carrier. The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) [*47 USCS § 332(c)*], except to the extent that the Commission finds that such service should be included in the definition of such term.

* * * *

(37) Rural telephone company. The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity--

(A) provides common carrier service to any local exchange carrier study area that does not include either--

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996].

§ 201. Service and charges (47 U.S.C. § 201)

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is

hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

§ 202. Discriminations and preferences (47 U.S.C. § 202)

(a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

* * * *

(c) Penalty. Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $ 6,000 for each such offense and $ 300 for each and every day of the continuance of such offense.

§ 203. Schedules of charges (47 U.S.C. § 203)

(c) Overcharges and rebates. No carrier, unless otherwise provided by or under authority of this Act, shall engage, or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

* * * *

(e) Penalty for violations. In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $ 6,000 for each such offense, and $ 300 for each and every day of the continuance of such offense.

§ 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing (47 U.S.C. § 204)

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

§ 251. Interconnection (47 USCS § 251)

(b) Obligations of all local exchange carriers. Each local exchange carrier has the following duties:

* * * *

(5) Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 [*47 USCS § 252*] the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

* * * *

(f) Exemptions, suspensions, and modifications.

(1) Exemption for certain rural telephone companies.

(A) Exemption. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [*47 USCS § 254*] (other than subsections (b)(7) and (c)(1)(D) thereof).

* * * *

(h) Definition of incumbent local exchange carrier.

(1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--

(A) on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (*47 C.F.R. 69.601(b)*); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

§ 332. Mobile Services (47 U.S.C. § 332)

(3) State preemption.

(A) Notwithstanding sections 2(b) and 221(b) [*47 USCS §§ 152(b)* and *221(b)*], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

* * * *

(d) Definitions. For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 3 [*47 USCS § 153*]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

§ 501. General penalty (47 U.S.C. § 501)

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this Act, by a fine of not more than $ 10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this Act punishable under this section, shall be punished by a fine of not more than $ 10,000 or by imprisonment for a term not exceeding two years, or both.

§ 51.223 Application of additional requirements. (47 C.F.R. 51.223)

(a) A state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act, unless the Commission issues an order declaring that such

LECs or classes or categories of LECs should be treated as incumbent LECs.

(b) A state commission, or any other interested party, may request that the Commission issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs, pursuant to section 251(h)(2) of the Act.

APPENDIX F

FROM IOWA NETWORK ACCESS DIVISION TARIFF F.C.C. NO. 1

(Original Page 186
Effective: November 11, 2000)

16. Commercial Mobile Radio Service Transport

16.1 General

This section establishes terms and conditions governing the intrastate and interstate use of Iowa Network's facilities in the transport of calls from a subscriber of a Commercial Mobile Radio Service (CMRS) provider to a subscriber of a Routing Exchange Carrier and from a subscriber of a Routing Exchange Carrier to a subscriber of a CMRS provider. This tariff is being filed pursuant to 47 U.S.C. §303 and 332 establishing the FCC's primary jurisdiction over the service territory and rates charged for the routing of CMRS traffic. In the event that CMRS Transport is not considered an access service, compliance with this tariff satisfies a CMRS provider's obligation under 47 U.S.C. § 251(b)(5) to pay Iowa Network for the transport of CMRS calls.

16.2 Definitions

The following definitions apply to this Section 16:

Commercial Mobile Radio Service (CMRS): As defined in the Communications Act of 1934, as amended by the Telecommunications Act of 1996.

Intermediary Carrier: Qwest Communications and other telecommunications carriers, other than Iowa Network, that carry Transiting Traffic.

Originating Traffic: Calls placed by subscribers of a Routing Exchange Carrier to subscribers of a CMRS Provider (wireline to wireless).

Terminating Traffic: Calls placed by subscribers of a CMRS Provider to subscribers of a Routing Exchange Carrier (wireless to wireline).

Transiting Traffic: CMRS traffic that originates from one telecommunications carrier's network, transits another telecommunications carrier's network, and terminates to yet another telecommunications carrier's network. Transiting traffic provides the ability for the Intermediary Carrier to use its connection to an Iowa Network local or access tandem for delivery of calls that originate with a CMRS provider, utilize the network of Iowa Network and terminate to a Routing Exchange Carrier.

* * * *

(Original Page 187
Effective: November 11, 2000)

16. Commercial Mobile Radio Service Transport (Cont'd)

16.5 Obligations of Intermediary Carriers

(a) Provision of Usage Information

When an Intermediary Carrier delivers Transiting Traffic between a CMRS provider and Iowa Network, the Intermediary Carrier shall promptly provide Iowa Network with usage information for that CMRS provider. The usage information shall be in a form acceptable to Iowa Network and, at minimum, be consistent with MECAB and MECOD guidelines and in EMI format and otherwise sufficient to facilitate the billing of the CMRS provider pursuant to this tariff. If the Intermediary Carrier does not provide information requested by Iowa Network to accurately bill the CMRS provider, the Intermediary Carrier shall be the customer for purposes of this intrastate and interstate traffic. Iowa Network shall assess tariff charges to the Intermediary Carrier as described in this Section 16, and the Intermediary Carrier shall promptly pay such charges to Iowa Network pursuant to the terms of this tariff.

(Original Page 188
Effective: November 11, 2000)

(c) Intermediary Carrier Liability

Notwithstanding the forgoing Subsections (a) and (b), Intermediary Carriers are solely liable to Iowa Network for the termination of Transiting Traffic that was terminated by Iowa Network prior to the effective date of this tariff. Such

liability was established and governed by applicable state tariffs filed and approved by the Iowa Utilities Board. Following the effective date of this tariff, this tariff rather than the Iowa Network state tariff shall govern the charges for the transport of intrastate and interstate CMRS traffic pursuant to the FCC's jurisdiction over such CMRS traffic.

16.6 Usage Charge

The charge applicable to intrastate and interstate Commercial Mobile Radio Service Transport, is the same charge applicable to other uses of Iowa Network's CEA facilities, and is found in Section 6.8.1(A).

APPENDIX G

Iowa Utilities Board

DOCKET NO. SPU-00-7;
TF-00-275 (DRU-00-2)

[Filed March 18, 2002]

IN RE: EXCHANGE OF)
TRANSIT TRAFFIC)
)

ORDER AFFIRMING PROPOSED DECISION AND ORDER

PROCEDURAL HISTORY

On May 19, 2000, Qwest Corporation (Qwest) filed a petition with the Utilities Board (Board) for a declaratory order regarding the exchange of local traffic by wireless and other local calling entities using Qwest's facilities. Qwest's petition was identified as Docket No. DRU-00-2. However, due to the complexity and number of issues presented by the petition, the Board subsequently docketed the petition as a contested case proceeding, identified as Docket No. SPU-00-7.

On November 26, 2001, Board Chairman Munns, sitting as a Presiding Officer pursuant to earlier order of the Board, issued a "Proposed Decision and Order" in this docket. As summarized in the proposed decision, this case concerns

telephone traffic between a wireless customer and a wireline customer served by an independent telephone company. Currently, if the wireless customer places such a call, the wireless companies deliver the call to Qwest, which transports the traffic to Iowa Network Systems, Inc. (INS), a centralized equal access service provider. INS then carries the call to the independent local exchange carriers (LECs) for connection to the called customer. Qwest charges the wireless companies a transit fee for carrying the traffic. INS charges a "centralized equal access" (CEA) fee to Qwest for carrying the traffic. The independent LECs assess access charges to Qwest for terminating the wireless traffic to their customers.

In the proposed decision and order, the Presiding Officer concluded that federal law defines the wireless traffic at issue as "local," so access charges do not apply. The wireless carriers are entitled to interconnect directly with the independent LECs on a bill-and-keep basis, pursuant to Board and Federal Communications Commission (FCC) rules. Qwest is entitled to compensation for carrying this traffic but has no obligation to pay access or other terminating fees because this is local traffic. If the wireless carriers want to use INS facilities for an indirect connection, they may do so, but INS is entitled to compensation for providing those services. The appropriate rate for INS's services cannot be determined on this record. The parties were encouraged to negotiate an agreement regarding these matters under the federal Act, with Board arbitration available for any issues the parties are unable to resolve by negotiation.

On December 11, 2001, notices of appeal were filed by INS, the Rural Iowa Independent Telephone Association (RIITA), Qwest, Iowa Telecommunications Association (ITA), and Central Scott Telephone Company (Central Scott). On December 21, 2001, the Board issued an order waiving

rules 7.8(2)"c" and "d" and establishing a procedural schedule for this appeal.

Pursuant to that schedule, on January 11, 2002, responses to the notices of appeal were filed by INS, Qwest, RIITA, ITA, Central Scott, U.S. Cellular, and Verizon Wireless (collectively referred to hereinafter as Verizon), Sprint Spectrum L.P. d/b/a Sprint PCS and Sprint Communications Company L.P. (Sprint), South Slope Cooperative Telephone Company, Inc. (South Slope), and AT&T Wireless Services, Inc. (AT&T Wireless).

The parties raise numerous alleged issues regarding the Proposed Decision, but almost all of them fall within the four major issues identified and decided by the Presiding Officer. Accordingly, this order will be organized along the lines of the Proposed Decision, with a concluding section for issues not decided in the Proposed Decision.

Some of the parties requested that the Board establish a schedule for further briefing and, in some cases, oral argument. The Board will deny those requests. The parties fully briefed each of these issues after the hearing and the notices of appeal and responsive filings are substantial and appear to contain all arguments the parties would present to the Board if additional briefing were permitted. No purpose would be served by burdening the record with repetitive argument.

ANALYSIS

Issue 1. Do access charges apply to intraMTA CMRS traffic?

A. Summary of arguments

ITA and INS argue the Proposed Decision is in error when it concludes that the FCC has ruled that intraMTA[1] CMRS[2] traffic is "local" and that access charges therefore do not apply. (*See, e.g.*, INS Notice of Appeal at pages 8-9.) The ITA and INS rely upon paragraphs 45 and 46 of the FCC Remand Order,[3] in which the FCC finds that 47 U.S.C. § 251(g) excludes certain types of telecommunications traffic (specifically, data traffic bound for an internet service provider, or ISP) from the other provisions of § 251. INS and ITA argue that this reasoning also excludes intraMTA CMRS traffic that was being treated as access traffic prior to the passage of the Telecommunications Act of 1996[4].

---

[1] "IntraMTA traffic" is wireless originated or terminated traffic within a federally-defined Major Trading Area (MTA). The majority of Iowa is in the Des Moines MTA.

[2] "CMRS" is Commercial Mobile Radio Service, the federal term for cellular, PCS, and other wireless communications systems where at least one end of the call uses technology that can be, and ordinarily is, used while mobile.

[3] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, "Order On Remand And Report And Order," 16 FCC Rcd 9151 (2001) (hereinafter the ISP Remand Order).

[4] INS also argues that in November of 2001 it filed revisions to its FCC tariff that make it the governing tariff for all delivery if

Qwest, Verizon, and Sprint respond that the Proposed Decision correctly concludes that access charges do not apply to intraMTA CMRS traffic because it is local traffic. They argue that in paragraph 47 of the ISP Remand Order, the FCC specifically stated that its § 251(g) analysis does not apply to CMRS traffic. Thus, the ITA and INS argument is in error and should be rejected.

B. Analysis

The argument advanced by INS and ITA relies upon selected quotes from the FCC's ISP Remand Order, but ignores other language in the order that is more directly applicable to this case. INS, for example, argues that paragraph 30 of the ISP Remand Order substituted a new analysis under 47 U.S.C. § 251(g) for the § 251(b) analysis in the earlier Local Competition Order (cited in the Proposed Decision in this docket). However, paragraph 30 of the ISP Remand Order is directed to ISP-bound data traffic on the wireline network and does not apply to wireless traffic. In paragraph 47 of the same ISP Remand Order, the FCC clearly states that the ISP data traffic analysis does not apply to CMRS traffic and that the analysis of the Local Competition Order continues to hold true:

> 47. **We note that the exchange of traffic between LECs and commercial mobile radio service (CMRS) providers is subject to a slightly different**

CMRS traffic in Iowa, *see* INS Notice of Appeal at pages 4-5. INS offers no explanation as to how a federally-filed tariff can govern intrastate traffic and still comply with 47 U.S.C. § 152(b), which prohibits the FCC from exercising jurisdiction over intrastate communications services. The Board finds this argument without merit and will not further address it.

analysis. In the Local Competition Order, the Commission noted its jurisdiction to regulate LEC-CMRS interconnection under section 332 of the Act but decided, at its option, to apply sections 251 and 252 to LEC-CMRS interconnecti n. At that time, the Commission declined to delineate the precise contours of or the relationship between its jurisdiction over LEC-CMRS interconnection under sections 251 and 332, but it made clear that it was not rejecting section 332 as an independent basis for jurisdiction. **The Commission went on to conclude that section 251(b)(5) obligations extend to traffic transmitted between LECs and CMRS providers, because the latter are telecommunications carriers.** The Commission also held that reciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area (MTA). In so holding, the Commission expressly relied on its "authority under section 251(g) to preserve the current interstate access charge regime" to ensure that interstate access charges would be assessed only for traffic "currently subject to interstate access charges," although the Commission's section 332 jurisdiction could serve as an alternative basis to reach this result. **Thus the analysis we adopt in this Order, that section 251(g) limits the scope of section 251(b)(5), does not affect either the application of the latter section to LEC-CMRS interconnection or our jurisdiction over LEC-CMRS interconnection under section 332.**

ISP Remand Order, paragraph 47 (bold emphasis added, other emphasis in original; footnotes omitted.) In other words, INS and ITA rely upon the reasoning of a particular FCC order

relating to ISP traffic to support their position regarding wireless traffic. However, the same FCC order clearly states, in a later paragraph, that the reasoning applicable to ISP traffic does not apply to wireless traffic. INS and ITA ignore this clear, contrary language from the same FCC order. The Board rejects the ITA and INS arguments regarding the application of access charges to intraMTA CMRS traffic and affirms the Proposed Decision and Order on this point.

Issue 2. Should the ITA's proposed tariff be approved?

A. Summary of arguments

While this case was pending, ITA filed with the Board a proposed tariff that would allow the independent LECs to concur in the tariff and charge access-based rates to the CMRS providers and to Qwest for termination of intraMTA CMRS calls. The Proposed Decision and Order rejected ITA's proposed tariff because it would have imposed access charges on local calls. (Proposed Decision and Order at page 21.)

ITA argues the rejection of its proposed tariff was in error for a variety of reasons. First, ITA argues the proposed tariff was not an "access" tariff, so it cannot be rejected for attempting to apply access charges to local service. Instead, ITA calls the tariff a "wireless transport and termination tariff." (ITA Notice of Appeal at pages 12-13.) ITA admits the proposed rate is based on the sum of the traffic-sensitive access rate elements contained in the ITA access tariff, but argues that does not make the resulting rates into access charges. (*Id.*)

Second, ITA argues its proposed tariff rates are lower than the weighted average forward-looking economic costs

(TELRIC rates) of the participating telephone companies. ITA asserts this proves the proposed rates are lawful and reasonable. (*Id.*)

Third, ITA argues that if Qwest is permitted to have a tariff for providing transit services to wireless carriers, ITA should be permitted to have one, too. (*Id.*) (The Board notes that the Proposed Decision and Order recognized the ability of INS to file such a tariff *see* page 30, footnote 5. It is not clear why ITA should be permitted to file such a tariff, however, when its members are terminating the traffic, rather than transiting it. The Board's rules require that local traffic be originated and terminated on a bill and keep basis, as discussed below, making a tariff unnecessary and inappropriate.)

Fourth, ITA argues the Board should follow Missouri's example and approve a model tariff in which the independent telephone companies can concur, since ITA believes the wireless carriers will never request or participate in negotiations. (ITA Notice of Appeal, pages 12-13.)

ITA also argues that review and approval of a tariff is the only way in which the Board can consider market price information for this traffic, as contemplated in the Proposed Decision and Order. Specifically, if the negotiations envisioned in the Proposed Decision and Order fail and the Board is forced to arbitrate interconnection agreements between the independent LECs and the wireless carriers, the Board will not be able to consider market rate information in determining the applicable rates, according to ITA. This is because 47 U.S.C. § 252(d)(2)(A) requires that such rates be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." The FCC rules implementing that statute limit the Board to consideration of

forward-looking economic costs (i.e., TELRIC methodology), the FCC's default proxies, or bill and keep. The default proxies were struck down in *Iowa Utilities Board v. FCC*, 219 F.3d 744, 755-56 (8th Cir. 2000), and bill and keep is inappropriate due to traffic imbalances, so in any future arbitration proceeding the Board would be limited to TELRIC pricing, according to ITA. (ITA Notice of Appeal, pages 17-19.)

Verizon responds that the Proposed Decision and Order properly rejected the ITA tariff. Verizon argues the Proposed Decision and Order did not find the proposed tariff was an access tariff, but instead found that the proposed charges are access charges, which cannot be applied to local traffic. Verizon says that ITA admits its proposed charges are nothing more than the sum of the traffic-sensitive access elements in the ITA access tariff. (Verizon response at pages 2-5.)

Verizon also argues that experience in other states shows that negotiations can be effective in resolving these issues, citing Minnesota and South Dakota. (*Id.* at pages 7-9.)

Next, Verizon argues ITA mischaracterizes the Proposed Decision and Order regarding the evidence that will be considered in future rate-setting proceedings, should arbitration be necessary. (*Id.* at page 9.) When discussing the cost evidence to be considered in any future proceeding, the Proposed Decision and Order refers only to the transit rates to be charged by INS, not to the termination fees that may be charged by the independent LECs (if the Board's bill and keep rule is found to be inapplicable).

Finally, Verizon argues the use of bill and keep is consistent with the Board's rule, 199 IAC 38.6, which requires a showing that an imbalance has existed for six

months before bill and keep may be rejected. No such evidence was offered, so the Board's rule requires the use of bill and keep, for the exchange of these calls.

Sprint also supports rejection of the ITA tariff, noting that the ITA witness's justification for the proposed rates is that they were based upon access rate elements; Sprint concludes that the resulting rates are, in fact, access charges regardless of how ITA wants to label them. (Sprint response at pages 7-8.) Because local traffic is not subject to access charges, and because intraMTA CMRS traffic is local, the ITA's attempt to establish an access rate regime for that wireless traffic must be rejected.

Qwest responds to the ITA by arguing that the record evidence supports a finding that the proposed tariff was an access tariff, despite ITA's preferred label, because it attempts to impose access charges. (Qwest response at page 15.) Qwest also argues the evidence includes other examples of why the proposed tariff should be rejected as unreasonable. For example, the proposed tariff gives unreasonably preferential treatment to INS. (Tr. 2407; Ex. 105, § 1.1A.) The proposed ITA tariff gives the independent LECs unilateral discretion regarding points of interconnection and frequency of billing, provisions that Qwest believes to be unreasonable. (*Id.*)

B. Analysis

The Board will affirm the Proposed Decision And Order and reject the proposed ITA tariff. Despite ITA's claims to the contrary, the rates in the proposed tariff are entirely based on access rate elements and the resulting rates are, in fact, access rates. Otherwise, they have no cost justification at all. Moreover, the Board's rules (199 IAC 38.6) specify the use

of bill and keep for the exchange of local traffic, at least until such time as a continuing and significant traffic imbalance has been shown. This record contains, at best, very limited evidence regarding any alleged traffic imbalance between these CMRS carriers and the independent LECs. The evidence falls far short of the requirements of Rule 38.6. Moreover, ITA's numbers appear to be skewed by the independent LECs' practice of requiring that their own customers dial CMRS customers as toll calls, using 1+ or 0+ for that purpose (and thereby increasing their own originating access charge revenue). If the independent LECs were to treat intraMTA calls from their own customers to CMRS customers as local traffic, then the traffic would be more evenly balanced.

Issue 3. If intraMTA CMRS traffic is local, then how should this traffic be exchanged?

A. Summary of arguments

RIITA, ITA, and INS argue that the Board should approve the proposed ITA tariff rather than require negotiations and should not apply its rule regarding bill and keep to the intra-MTA wireless traffic at issue in this docket. These issues were discussed in the preceding section and will not be repeated here. The remaining issues under this heading concern whether the parties can be required to negotiate interconnection agreements under the Telecommunications Act of 1996.

Central Scott argues the wireless carriers (and, presumably, Qwest) have no right to interconnect with the independent LECs pursuant to a § 252 negotiated interconnection agreement because the independent LECs are all rural LECs under § 251(f)(1) and are therefore exempt

from § 251(c) duties and obligations. Instead, according to Central Scott, rural LECs may exercise their discretion in choosing how to meet their interconnection obligations under § 251(a) and may choose to do so directly or indirectly. (Central Scott Notice of Appeal at pages 8, 13-14.)

Verizon responds to Central Scott's argument by first noting that there is no record evidence that Central Scott, or any of the other independent LECs, fits the definition of a rural carrier. (Verizon response at page 22.) Verizon also points out that Iowa Code § 476.101 provides a state law basis for interconnection requirements without a rural exemption. (Verizon response at page 23.) Finally, Verizon argues that 47 U.S.C. § 251(f) authorizes states to remove a rural exemption, where appropriate. Verizon argues this is an appropriate situation. (*Id.*)

Qwest also responds to Central Scott's rural exemption argument, *see* Qwest response at page 51. Qwest argues that regardless of any rural exemption, Central Scott is still obligated to interconnect, directly or indirectly, with CMRS providers, pursuant to 47 U.S.C. § 251(a)(1) and to establish reciprocal compensation arrangements for transport and termination under § 251(b)(5). Qwest also notes the Board has the authority to terminate Central Scott's rural exemption, pursuant to § 251(f)(1).

INS argues that it cannot be made to participate in negotiations and, potentially, arbitration proceedings leading to an interconnection agreement. INS argues that §§ 251(c) and 252, relating to negotiating interconnection agreements and arbitration proceedings, respectively, apply only to incumbent LECs and requesting telecommunications carriers, pursuant to § 251(b). (INS Notice of Appeal at page 16.) INS argues it is not an incumbent LEC, and therefore is not

subject to the §§ 251(c) and 252 obligations. (*Id.* at page 17.) For the same reason, INS argues its agreement with Iowa Wireless is not an interconnection agreement that is subject to opt-in rights under 47 C.F.R. § 51.809.

Verizon responds that INS is subject to state law interconnection requirements pursuant to § 476.101 and 199 IAC 38.3. Furthermore, Verizon argues that the record in this docket reveals that INS is, in fact, a LEC and therefore subject to LEC obligations. (Verizon response at page 17.)

Qwest argues that INS admitted in this proceeding that it is a LEC with a duty to enter into reciprocal compensation agreements under § 251(b)(5), citing INS Ex. 201, page 5. (Qwest response, page 25.) Qwest concludes that if INS wants to be compensated for providing interconnection services in Iowa, it is within the Board's authority to require that INS negotiate and enter into reasonable agreements for that purpose.

B. Analysis

The Board will affirm the Proposed Decision and Order with respect to issue three. The record in this docket is not adequate to permit resolution of all of the issues related to interconnection between and among the various parties to this proceeding, because the parties were not focused on interconnection details. As a result, the record lacks solid information regarding such matters as rural exemption claims, appropriate interconnection rates, and other matters.

Under these circumstances, the best available option is to invoke the procedures of the federal Act and direct the parties to negotiate, then (if necessary) come to the Board for arbitration. The duty to negotiate applies directly to the LECs

and wireless carriers, but may not apply to INS; however, the duty to interconnect (and, therefore, the duty to carry traffic) applies to INS just as it does to the other parties, so if INS wants to be compensated for carrying this traffic it will have to participate in the negotiations and, if necessary, the subsequent arbitration proceedings.

With respect to Central Scott's specific claim of a rural exemption under § 251(f), the Board finds the issue was adequately addressed in the Proposed Decision and Order at page 33:

> The [independent LECs] may raise rural exemption claims with respect to this traffic. If so, the Board can establish procedures for making the necessary determinations under 47 U.S.C. § 251(f). Those determinations can be made within the time frame provided for negotiations and arbitration under § 252.

In other words, the Proposed Decision and Order recognized that this record is not adequate to make any rural exemption determinations. The independent LECs have not proven they are entitled to assert the exemption and no evidence has been offered regarding potential adverse economic impacts on users, economic burdens on the LECs, technical feasibility, or the public interest, convenience, and necessity. These are the factors the Board will consider if and when a rural exemption claim is made and disputed, but this is not the time for making those determinations.

Issue 4. Is Qwest entitled to a refund for the 24-month period prior to April 1999?

A. Summary of arguments

The sole issue raised in Qwest's application for rehearing is the proposed resolution of issue four, relating to Qwest's claim for refunds from the independent LECs. Qwest seeks a refund of the access charges it paid to INS and the independents during the 24-month period prior to April 1999 (when Qwest stopped paying the bills it was receiving from INS and the independents). Qwest claims there is a standard (but unwritten) industry practice that billing errors should be corrected for 24 months prior to the discovery of the error.

The Proposed Decision and Order rejected Qwest's refund request, finding that prior to April, 1999, Qwest had ordered, received, and paid for services from INS and the independents and this payment history should not be changed at this time.

Qwest argues that if the traffic at issue was local traffic after April of 1999, and therefore not subject to access charges, then it was also local traffic prior to that date and not subject to access charges, so the access charges paid by Qwest should be refunded. (Qwest Notice of Appeal at pages 4-6.) Qwest also argues that it did not order these access services because it was not delivering toll traffic, the only type of traffic that can use access services. (*Id.*, pages 6-7.)

INS argues Qwest is not entitled to any refunds, but should instead be required to pay the tariffed CEA and access charges up to the present and into the future, either because (a) this is the proper tariff to apply or (b) this is what the parties agreed upon. (INS response at pages 1-16.) INS next argues that Qwest did not give notice of its position that this

is local traffic until April 12, 1999, so Qwest is bound by the tariff prior to that date. (INS response at pages 13-17.)

In the alternative, INS argues there is no standard industry practice for 24-month refunds where the parties have agreed otherwise, as INS argues was done here, citing Qwest's acceptance of services and payment of bills prior to April 12, 1999. (INS response, pages 17-20.)

INS also argues that any refund would be illegal retroactive ratemaking and a violation of the filed rate doctrine, since it would amount to finding INS's CEA tariff to be retroactively unlawful. (INS response, pages 20-22.)

Finally, INS argues Qwest's calculation of the allegedly incorrect billings is so susceptible to error that it must be rejected. (INS response, pages 22-23.)

ITA argues that Qwest was acting as an interexchange carrier at least until the Proposed Decision and Order was issued, so access charges were appropriate and should be paid. (ITA response at pages 2-3.) Otherwise, ITA argues, Qwest was in violation of 199 IAC 22.14(2)(d)(7), which prohibits delivery of local traffic over access trunks. ITA also argues that the Proposed Decision and Order correctly found that Qwest ordered and received access services and therefore should be required to pay for those services. (*Id.*)

Finally, ITA argues there is no credible evidence in the record to support refunds. Qwest's confidential exhibit 36, which Qwest relies upon to prove the amount of its claimed refunds, was filed after the close of the hearing, preventing the parties from fully litigating the many apparent errors and inconsistencies alleged to be contained therein. (*Id.*, pages 4-5.)

B. Analysis

The Board will affirm the Proposed Decision and Order with respect to issue four. Prior to April 12, 1999, Qwest ordered, used, and paid for CEA and access services from INS and the independent LECs for this traffic. The parties' actions demonstrate an agreement that the access charge tariffs were applicable up to a certain time, and that agreement should be enforced up to the moment that one of the parties (Qwest, in this case) unambiguously informed the other that the agreement was no longer in effect.

INS has argued that the failure to apply the tariff after April of 1999 is a violation of the filed rate doctrine or is prohibited retroactive ratemaking, but those principles are not applicable to the unusual circumstances of this case. Normally, if a filed tariff establishes a rate for a service, such as carrying another carrier's traffic, that rate would apply to the traffic up to the date that the tariff was determined to be no longer reasonable and lawful. That rule does not apply in these circumstances, however, because there is no filed tariff that properly applies to this traffic. The only potentially relevant filed tariff is an access tariff, which does not apply to local traffic. In the absence of a relevant filed tariff, the filed rate doctrine does not apply, and Qwest is not obligated to pay CEA and access charges for this local traffic after April of 1999.

For the same reason, the general prohibition against retroactive ratemaking does not apply. The Board is not ordering that the rates of INS or the independent LECs should be changed retroactively; instead, the Board finds that INS and the independent LECs do not have any rates to apply to this traffic after April of 1999.

The situation prior to that date is different, however. Before Qwest gave notice that it no longer considered the CEA and access charge tariffs applicable, the parties had agreed that those tariffs applied to this traffic, as evidenced by the fact that INS and the independent LECs billed Qwest pursuant to those tariffs and Qwest paid those bills.

When the wrong tariff is applied in a dispute between a regulated utility and a typical end-user, it may be appropriate to revisit and recalculate past bills to correct the error.[5] However, in a dispute between two telephone companies, each possessed of substantial subject matter expertise and a thorough understanding of the various circumstances applicable to the situation, it is more appropriate to enforce the parties' agreement regarding the applicable tariff (as evidenced by their actions), at least until one company has adequately notified the other that it no longer agrees regarding application of the tariff. In this case, that notice was given so as to be effective in April of 1999.

Moreover, the Board's understanding is that Qwest's alleged industry practice of giving 24-month refunds is limited to billing mistakes, that is, mathematical errors, erroneous entries, and the like. The industry practice is obviously intended as a means of rough justice, to save all parties the expense of reviewing each and every mistake to determine when it first occurred and how far back it should be corrected. The practice is inapplicable in a case like this,

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[5] Even in these circumstances, this is not always true, *see State Central Bank of Keokuk v. Great River Gas Co.*, 368 N.W.2d 128 (Iowa 1985) (holding that when a customer qualified for two different service tariffs, and learned that the other tariff would be less expensive over time, the customer was not entitled to refunds for past amounts paid under the higher-cost tariff).

where the dispute concerns difficult legal questions about which reasonable people may disagree, rather than simple computational errors.

OTHER ISSUES RAISED IN THE NOTICES OF APPEAL

Some of the parties raise additional issues in their notices of appeal that they believe were not addressed in the Proposed Decision and Order, as follows.

Central Scott. Central Scott argues that Qwest is violating the EAS agreement between Central Scott and Qwest by delivering non-Qwest-originated traffic over the EAS trunks. Qwest responds that Central Scott is complaining about the mere possibility of a violation, without any proof that such a violation has actually occurred. (Qwest response, page 35.) Qwest also argues that it properly advised Central Scott that wireless-originated traffic was being terminated over the facilities that also carry EAS traffic between the two companies; Qwest offered to provide its 11-50-21 records to Central Scott to identify the traffic, but Central Scott declined the offer. (Qwest response, page 36.) Finally, Qwest notes that Central Scott sends traffic to Qwest over the same facilities for delivery to wireless carriers and their customers; the Central Scott witness explained this practice by asserting that "the trunk groups between us are just trunk groups." (*Id.*, citing Tr. 1422.)

The Board finds that, to the extent wireless-originated or terminated local calls are being sent over the EAS trunks between Qwest and Central Scott, the parties have modified their EAS agreements by their practices to accept this usage. The evidence shows that both companies are using these trunks to carry local traffic between Central Scott's customers

and customers of various wireless carriers; as the Central Scott witness said, the parties have treated these facilities as "just trunk left it to the parties to negotiate these issues then bring them to the Board for arbitration if they are unable to resolve them through negotiations. (Qwest response, pages 27-31.)

The Board agrees with Qwest's response; the Proposed Decision and Order directed the parties to negotiate these and other issues. These are good examples of issues that cannot be resolved on the record made by the parties in this proceeding, but that can be resolved, if necessary, in a future arbitration proceeding (if negotiations fail).

INS also argues that the Proposed Decision and Order failed to recognize that the customers of the independent LECs have the right to dial 0+ or 1+ to reach wireless customers with an intraMTA wireless number, thereby using their preferred interexchange carrier (IXC) to complete the call. (INS Notice of Appeal, page 20.)

Qwest argues that is not an issue that had to be decided in this docket because it does not relate to the issues in Qwest's original petition. (Qwest response, pages 31-32.) Qwest also argues the independent LECs are engaged in an "egregious practice" of forcing their customers to make calls to local wireless numbers using 1+ or 0+ in order to "rack up access charges and long distance fees for calls that the FCC has deemed local, and not subject to access charges or toll charges." (*Id.*, footnote 14.)

INS's argument assumes that customers should pay toll charges in order to make local calls to wireless customers. However, it is obvious that if the customers were given the choice between making a local call to a wireless customer or

making a toll call to the same wireless customer, most customers would likely waive their "right" to make a toll call using their preferred interexchange carrier in favor of making the same call as a local one, with no additional charges. The Board will affirm the Proposed Decision and Order on this issue and direct the independent LECs to allow their customers to dial these local calls as local calls.

Finally, INS argues the Board failed to address the issue of whether Qwest should be required to pay late payment penalties on the CEA billings that Qwest has refused to pay since April of 1999. As the Board is affirming the Proposed Decision and Order and finds that Qwest is not obligated to pay centralized equal access charges on local traffic, this issue is moot.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The requests for briefing or oral argument filed on December 11, 2001, by Iowa Network Services, Inc., Central Scott Telephone Company, Iowa Telecommunications Association, and the Rural Iowa Independent Telephone Association are denied.

2. The Proposed Decision and Order issued in this docket on November 26, 2001, is affirmed. The notices of appeal filed on December 11, 2001, by Iowa Network Services, Inc., Rural Iowa Independent Telephone Association, Qwest Corporation, Iowa Telecommunications Association, and Central Scott Telephone Company, are denied.

3. Any arguments that may have been presented in a notice of appeal or responsive document that where not

specifically discussed in the body of this order are rejected as either moot or without merit.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 18th day of March, 2002.